DOCUMENT RESUME

ED 244 134 CE 038 979

AUTHOR	Chachkin, Norman
TITLE	State Enforcement of Civil Rights in Vocational Education: Partner or Stepchild? A Report on Implementation of Section II of the 1979 Vocational Education Guidelines by the Office for Civil Rights, U.S. Department of Education.
INSTITUTION	Lawyers' Committee for Civil Rights Under Law, Washington, D.C.
SPONS AGENCY	Ford Foundation, New York, N.Y.
PUB DATE	84
NOTE	304p.; Portions of appendixes are marginally legible.
PUB TYPE	Reports - Research/Technical (143)
EDRS PRICE	MF01/PC13 Plus Postage.
DESCRIPTORS	Affirmative Action; *Civil Rights; *Civil Rights Legislation; *Compliance (Legal); Equal Education; Federal Government; Federal Legislation; Federal Regulation; *Federal State Relationship; Government School Relationship; Law Enforcement; *Legal Responsibility; Nondiscriminatory Education; Postsecondary Education; Secondary Education; State Government; Statewide Planning; *Vocational Education
IDENTIFIERS	Department of Education; Office for Civil Rights; *Vocational Education Guidelines 1979

ABSTRACT

An investigation was conducted of state enforcement of the Vocational Education Guidelines issued in 1979 to prevent discrimination on the basis of race, national origin, sex, or handicap in vocational training. The guidelines are administered by the Office of Civil Rights (OCR) through methods of administration (MOA) developed by the states that show how each state plans to fulfill its obligations to monitor the delivery of vocational training and to enforce the applicable nondiscrimination requirements of Federal law. The investigation found that less than 20 percent of the states were doing an acceptable job of enforcing civil rights. The blame for this situation was placed with OCR and the U.S. Department of Education, which have not provided effective information, guidance, and training together with sufficient Federal oversight to ensure that the results are adequate. It was charged that the Department of Education has been unwilling to undertake or to give appropriate priority to the necessary Federal guidance and oversight to make a Federal-state partnership in civil rights work. Similarly, OCR has been unwilling to exert the necessary central oversight and control from headquarters to ensure that the regional offices are provided with the training, information, and guidance that they require to perform their roles in the MOA process. The study concluded that until Federal authorities take action, state civil rights enforcement in vocational education will remain neglected. Appendixes include applicable rules and regulations, evaluation forms, and correspondence. (KC)

ED244134

STATE ENFORCEMENT OF CIVIL RIGHTS IN VOCATIONAL EDUCATION:

Partner or Stepchild?

A Report on Implementation of
Section II of the 1979 Vocational
Education Guidelines by the Office
for Civil Rights, U.S. Department
of Education

Federal Education Project
Lawyers' Committee for Civil Rights Under Law
1400 Eye Street, N.W., Suite 400
Washington, D.C. 20005
(202) 371-1212

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The research for this report was conducted primarily by Debra Miller, and it was written principally by Norman Chachkin. We gratefully acknowledge the assistance of Deborah Ashford, Linda Brown, Phyllis McClure, and Janet Wells in reviewing drafts of the report and making helpful suggestions. Without the cheerful help of Frances Courtney and Betty Green in typing and proofreading the manuscript, the report could not have been completed.

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The research and writing of this report was supported in part by a grant from the Ford Foundation, but the views expressed herein are solely those of the Federal Education Project and the Lawyers' Committee for Civil Rights Under Law.

(C) 1984

EXECUTIVE SUMMARY

Development of the Guidelines

Federal concern over the use of grant funds to support discriminatory practices first became significant in 1964, when the Congress passed Title VI of the Civil Rights Act. This law banned racial discrimination "under any program or activity receiving Federal financial assistance" and directed all federal grantmaking agencies to enforce the prohibition.

Until prodded by the filing of a lawsuit against it, however, the Department of Health, Education and Welfare made little or no attempt to investigate Title VI compliance in vocational training programs. Over the next half decade the agency's efforts were rudimentary and ineffective. In 1977, following further court proceedings, OCR agreed to gather detailed information about patterns of enrollment in vocational education and to develop an enforcement program.

As part of this program, the Vocational Education Guidelines were issued in 1979 following extensive study and drafting. In addition to substantive guidance about the nondiscrimination requirements affecting vocational education, the Guidelines mandated that each state receiving federal funds must become involved, on a regular basis, in activities to prevent and eliminate discrimination on the basis of race, national origin, sex or handicap in vocational training.

The "Methods of Administration"

The initial task of the states under the Guidelines was to draft, and submit for federal approval, a "Methods of Administration" (MOA) plan describing how each would fulfill its obligations to monitor the delivery of vocational training and to enforce the applicable nondiscrimination requirements of federal law. OCR sought to employ several mechanisms to assist the states in framing adequate and workable MOAs -- but deficiencies in planning, management and execution sharply restricted their efficacy.

First, OCR reached an agreement within HEW that the substantive vocational education program staff, in the Bureau of Occupational and Adult Education (BOAE), should receive training about, and thereafter participate in administering, the Guidelines. OCR and BOAE did jointly promulgate, in July of 1979, a Memorandum of Procedures (MOP) providing greater specificity about the required contents of state MOAs, but BOAE's subsequent role was minimized because no special training for its staff was ever conducted.

Second, the Department awarded a contract to CRC Education and Human Development, Inc. to provide training to state personnel about the Guidelines and to assist them in developing their MOAs. However, the award was not made until six months after the Guidelines were published and this delay prevented the contractor from conducting its first training session until one month before the MOAs were due to be turned in to the federal government. Thus, most states had already undertaken substantial drafting of their plans before any training took place.

Third, OCR never identified any high-ranking authority within the agency to have the overall responsibility for the MOA process, and, in fact, shifted this responsibility internally (once the Guidelines were issued) to a division with little or no prior involvement in their creation. This failure to provide management leadership and support, combined with the lack of timely training for either BOAE or OCR staff, contributed to the inability of both the training contractor and state officials to obtain clarifications and advice about the MOP or the Guidelines as they attempted to design their own compliance processes.

Fourth, while the contractor worked intensively with four states and Guam to develop "model MOAs" which it then utilized in its training sessions, no one in OCR or BOAE reviewed and approved these plans before the training was begun. The model MOAs in fact contained some glaring inconsistencies with the Guidelines and other deficiencies which limited their suitability as exemplars.

These problems all combined to circumscribe drastically the extent of federal government assistance to the states at the start of the MOA process, and in all likelihood contributed to the substantial delay which then occurred in securing acceptable MOAs from all of the states and in commencing their implementation.

Approval of State MOAs

The Department of Education prepared for the task of receiving state MOAs, analyzing, and approving or returning them for revision, by developing a simplified checklist itemizing various provisions of the Guidelines or Memorandum of Procedures (MOP) which should be reflected in the MOAs. The checklist format encouraged only a cursory review of the substance of MOA submissions. It also omitted mention of some elements critical to an acceptable MOA.

Although regional offices have negotiated amendments to individual MOAs to correct deficiencies apparently overlooked in the initial approval process, OCR has never considered whether there are problems common to all or many MOAs that require coordinated attention, nor whether the MOP itself should be revised.

Further, the Department decided to have both OVAE and OCR review each state MOA, using the checklist, prior to approval, but OVAE's role was superficial at best and the Department expected OCR to make the real decisions about approval or rejection. OCR, however, did not act with appropriate dispatch; the last MOAs to be approved were not cleared until the summer and fall of 1982. This time lapse caused substantial delay in the implementation of the states' vocational education civil rights review programs since many jurisdictions declined to commence operations and the expenditure of resources until OCR had approved their MOAs.

Unfortunately, the lengthy federal review process did not guarantee that all omissions and deficiencies in the MOAs were identified and corrected. OCR again did not treat the MOAs as high-priority items nor assign substantial headquarters responsibility for their review. Instead, the states' submissions were simply shipped out to regional offices along with the Guidelines, MOP and checklist, notwithstanding the lack of any training of regional office personnel up to this time.

No additional written guidance was provided to regional staff and no one in headquarters was assigned full-time responsibility to answer questions and supervise the process. Perhaps it is not surprising, therefore, that the MOAs initially accepted by the Department often contained errors, omissions and inconsistencies with the Guidelines which would severely limit the efficacy of initial state enforcement efforts.

Training for Implementing the MOAs

Submission of MOA plans was only the first step in the state enforcement process; it had to be followed by effective implementation by knowledgeable personnel. Yet OCR waited until 1981 before seeking to provide training to the states for implementing the MOAs. On September 30 of that year the agency finally awarded a contract to the American Coalition of Citizens with Disabilities (ACCD) for written materials and six three-day workshops.

However, in late February, 1982 (two years after the MOAs should have been submitted and approved, and their implementation begun), OCR had to reject inadequate draft compliance and technical assistance manuals prepared by an ACCD subcontractor. Within the next six weeks a new subcontract was let and two new documents -- the only written materials supplementing the Guidelines and MOP ever distributed by OCR -- were rushed to completion in time for the workshops.

While these sessions were generally regarded by state personnel as helpful, there are major inconsistencies between the written documents and the Guidelines and MOP -- including some in critical areas such as the selection of subrecipients for desk audits and on-site reviews, the definition of "subrecipients," and the nature of vocational education "programs" which should be reviewed under the MOAs. The Compliance Manual and Technical Assistance Handbook prepared under this contract also omit any discussion of important subjects such as discriminatory state funding patterns (because, the contractor claimed, OCR was unable to provide guidance and directed that the matter simply be dropped from the written materials), and the presumption of discrimination where enrollment patterns in previously one-race or single-sex schools are unchanged.

Despite the recommendations of ACCD, the Manual and Handbook have never been updated to reflect recent legal developments or to correct these deficiencies. Nor has OCR undertaken (nor has it any current plans to undertake) any additional formal training for state personnel -- again contrary to the explicit recommendations of both ACCD and CRC.

Training and Guidance for OCR Staff

OCR was equally remiss about preparing its own personnel to assist and supervise the states in their implementation of the MOAs. Although the Guidelines and MOP were drafted by headquarters staff in Washington -- while responsibility for monitoring state activities would, like the earlier task of reviewing MOA submissions, be assigned to the regional offices -- no training for regional office employees was scheduled until September, 1981, a year and a half after MOA implementation was due to begin. That session utilized a draft manual for federal investigations of vocational education providers which contained only a brief addendum about the MOA process, and no further training was offered during the five-year period from 1979 to 1984.

Although John Scheldrup and David Gerard, in the headquarters office, tried to respond to telephone inquiries from the regions to the best of their ability, neither was assigned full-time responsibility for the MOA effort nor vested with authority to make policy decisions as they arose. As a result, it has been very difficult for both the OCR regional offices and for the states to obtain answers to questions and guidance from headquarters.

In fact, it has taken the agency inordinate lengths of time to make decisions about how the Guidelines and MOP are to be interpreted, as graphically illustrated by the experience of OCR with two New Mexico problems.

First, when the Guidelines were issued in 1979 HEW indicated that the Title IX and Section 504 regulations would be amended to include an explicit authorization for the MOAs. When this had not been accomplished by December, 1980, OCR decided it had no choice but to accept a New Mexico submission that proposed to limit the state's MOA activity to Title VI problems only.

Incredibly, and despite Education Secretary Bell's announced interest in a greater state role in civil rights enforcement, the regulations *still* have not been amended, and the Department's 1984 regulatory agenda does not include them. Moreover, OCR has adopted an extremely restrictive interpretation of its enforcement authority in the absence of such a regulatory change, virtually abandoning any effective monitoring of state activities under Title IX or Section 504.

Second, in 1982 the regional office in Dallas discovered that New Mexico was reviewing only postsecondary institutions because it limited "subrecipients" under its MOA to schools and districts receiving Vocational Education Act funds, despite the clear language of the Guidelines to the contrary. The regional office secured advice from Scheldrup and concluded that secondary school districts should also be subject to the MOA procedures.

However, instead of insisting upon its -- and Scheldrup's -- interpretation, the region referred the matter to headquarters in November, 1982, where it languished until February, 1984 before OCR officially decided that Scheldrup's view had been correct! The same issue had arisen in other states, and other OCR regional offices had taken a different view, but apparently this was beyond the knowledge of headquarters.

The combination of almost no staff training, no clearly defined MOA authority and responsibility at headquarters, no effective review of what the regional offices are actually doing, and the requirement of headquarters' prior approval for any MOA enforcement against the states, has resulted in stifling effective federal leadership and assistance to the states.

Federal Oversight of MOA Implementation

To date, the federal government's monitoring and supervision of the vocational education MOA process has been poorly planned, chaotically implemented, and largely ineffectual.

Although the Department of Education originally planned to involve the Office of Vocational and Adult Education (OVAE), as well as OCR, in the monitoring and evaluation of state efforts, this scheme was abandoned shortly after the first annual state MOA reports were received. Instead, OCR decided to have its regional offices carry out these duties, even though no staff time or resources had been allocated to the function in the agency's annual operating plans and even though regional office personnel still had not received any training about the Guidelines or MOP.

In September, 1981 the OCR regional offices received notice of their new responsibilities and of a training conference to be conducted in Denver the following week; this was the only training of OCR staff about the Guidelines and MOAs in the five years from 1979 to 1984.

Significant MOA activity did not occur in the regional offices until mid-1982, and even then, OCR headquarters provided little guidance or assistance. Decisions about whether to conduct on-site visits to states whose reports raised questions about the adequacy of MOA implementation, about the means for notifying the states of regional office conclusions, about how deeply to probe into the *substantive quality* of state activities, and about the sort of enforcement action to take, were all left to the discretion of the regional offices, without review by or direction from headquarters.

The pattern of regional office activity, accordingly, varied considerably. Most regions "suggested" changes in state programs but took no formal enforcement actions even when there was no improvement.

In the fall of 1982, after we began this study, OCR Assistant Secretary Singleton sought to evaluate the status of MOA implementation in each state by having the regional offices complete a questionnaire. The design of the instrument was inadequate, OCR waited for six months before analyzing the responses, and the headquarters staff ignored the few serious comments that were made by regional directors about deficiencies in the program. Instead, they prepared a memorandum to Singleton which asserted that most states were doing a good job and which provided two- or three-sentence capsule characterizations of each state's progress. After Singleton received another memorandum from one headquarters employee questioning whether the data were adequate to support this optimistic portrayal, Singleton had the questionnaire responses updated by a series of telephone calls to the regional offices (which still did not address the *quality* of state efforts) and announced that a task force would be convened to recommend improvements in OCR's handling of the MOAs.

Little beneficial change has taken place, however. Although in September of 1983, for the first time, written instructions for reviewing the state MOA reports were sent to the regional offices, they largely reiterated the language of the Guidelines and MOP and did not focus on the *substance* of state activity.

There remains no sense of OCR priority attached to the MOA process, either in the regions or at headquarters, as indicated by the continuing failure to appoint a high-ranking official to supervise the agency's efforts and provide guidance to the regional offices. The 1984 Annual Operating Plan still assigns no specific resources or staff time to this subject, and since many of OCR's other activities (such as complaint investigations and compliance reviews) are subject to court-ordered time limits, the MOAs inevitably receive little attention.

Moreover, the September, 1983 instructions to the regions direct review of state MOA activities only with respect to Title VI, thus substantially weakening federal oversight and enforcement. They also withdraw authorization for the regional offices to take any enforcement steps when they conclude there are deficiencies in state MOA activities, unless prior clearance from headquarters is secured; and OCR has further attenuated the effectiveness of its role by delaying for many months the release of regional office letters to the states summarizing the findings of the analysis of 1983 reports.

Finally, the regional offices have decided (and headquarters has agreed) that no compliance reviews of institutions or school districts covered by a state MOA on-site visit should be conducted -- even though this would provide an excellent opportunity to evaluate the substantive adequacy of a state's MOA procedures.

As a result of these policy decisions and management failures by the federal agency, there has been little or no incentive for states to meet the Guidelines and MOP requirements. The California State Department of Education, for example, had failed in four years to conduct a single desk audit or on-site review of a subrecipient but had never received a final Letter of Findings from the regional OCR office nor had there been any enforcement actions taken against it.

This dismal picture complements OCR's current deemphasis of enforcement in favor of what it calls "technical assistance."

"Technical Assistance" vs. Enforcement

Just as the Department of Education has failed to develop a credible and effective mechanism for monitoring state implementation of their vocational education MOAs and for enforcing

Section II of the Guidelines, so also have poor planning, ineffective management, and the lack of a strong commitment to put resources behind the MOA process drained the capacity of the Department to offer "technical assistance" to improve state performance.

OCR's redefinition of the term to include any post-investigation negotiation of a remedy with a subrecipient makes it nearly impossible to determine what aid it is providing to the states, especially since it does not require its regional offices to report MOA-related assistance separately to headquarters.

Training and materials have been offered to state personnel only in 1980 and 1982 and, despite the recommendations of both contractors who provided this training, materials have not been updated and no further training has been conducted or planned.

The technical assistance function is assigned to separate units within the regional offices that were originally established to provide guidance about Section 504; two years ago an OCR headquarters supervising official questioned the adequacy of their expertise in Title VI and Title IX matters.

The regional offices themselves assign no priority to offering technical assistance to the states. Their primary concern is meeting the court-imposed time deadlines for complaint investigation; no Regional Director's or supervisor's performance evaluation has ever focused on either technical assistance or the state MOAs; and their staffs have received training in this area only once, in September, 1981.

Furthermore, the Department has failed to commit adequate resources to technical assistance. Regional offices have had to turn down state requests for on-site assistance because they lack funds to pay for the travel involved; OCR reallocated funds appropriated for external contracting to provide technical assistance in FY 1981 and FY 1982 in order to pay salaries and expenses; and subsequent budget requests have included little or no money for this purpose. Incredibly, the FY 1981 and 1982 budget requests were justified on the ground that OCR lacked the staff expertise and training to deliver technical assistance, while the more recent omission of this item is justified by Assistant Secretary Singleton on the basis that OCR's staff "will now do technical assistance work that was previously contracted out." Nothing within the agency has changed substantially during this period of time.

In sum, the Department lacks any significant capacity effectively to assist the states in carrying out their MOAs.

The Record of OCR Investigations

Although OCR's own compliance experience in the vocational education field was very limited prior to the issuance of the Guidelines in 1979, the agency has not since that time made a purposive effort to increase its activities in this subject matter area, either (1) to ensure adequate enforcement of the substantive provisions of the Guidelines; (2) to provide "models" of investigations and reviews to state MOA personnel; (3) to develop more detailed explication of policy on unfamiliar subjects covered by the Guidelines, such as funding patterns; or (4) to obtain practical knowledge which will improve its ability to assist states in carrying out their MOAs.

Lacking any commitment or direction from headquarters, the OCR regional offices' work in vocational education has varied widely in intensity and adequacy, a result complicated by headquarters' failure to establish any quality control mechanism to review regional office performance in voc ed.

We examined 107 OCR reviews and investigations of providers of vocational education conducted between 1979 and 1982. Not one explored the issue of funding patterns, for example, and little if any attention was paid to questions with which the states find it most difficult to deal, such as racially identifiable school campuses, site selection, or admissions criteria. Moreover, we found instances in which regional offices appear to have misapplied the standards of the Guidelines in areas such as validation of admissions criteria and the existence of schools or campuses with student populations highly imbalanced by race or sex.

In some cases, important issues raised in compliance investigations (and reflected in internal Investigative Reports) were simply omitted entirely from Letters of Findings. On most questions, there was no uniform investigative or analytical approach, either among the regional offices or, sometimes, within the same office!

By permitting this state of affairs to occur and continue, OCR has both substantially weakened enforcement of the civil rights laws in vocational education and also deprived state MOA staffs of a source of meaningful expertise and advice.

The States

Five years after the Guidelines were issued, one cannot characterize state MOA implementation as effective. Although a small number of states have established functioning and largely effective programs, another small group may be considered to have no real enforcement process at all. Most states fall in the middle, with a variety of problems in their MOA programs which have not been adequately addressed by federal monitoring and oversight.

Based primarily upon the annual reports which the states have submitted to the Department of Education, a number of common deficiencies can be identified:

(1) Some jurisdictions have been beset by considerable turnover in staff assigned to work on the MOAs. Particularly

where no full-time assignments to MOA implementation have been made, or where placement of the function within the state structure has been altered during the past five years, this has impeded effective functioning.

(2) Many states have difficulty securing and analyzing the data necessary to conduct agency-level reviews; information about handicapped students is particularly lacking. Both major federal data sources -- the 1979 OCR survey of vocational institutions and the annual program data collection required under the Vocational Education Act -- have disadvantages for use in the MOA programs. Although states have developed a wide variety of methodologies for analyzing the data, OCR has not attempted to assess them in a systematic way.

(3) The examination of statewide policies and practices for discriminatory impact has not been completed in most jurisdictions. Especially lacking have been analyses of the distribution of state funds for vocational training and careful attention to admissions criteria and site selection.

(4) In a number of states there appears to have been little or no activity affecting post-secondary institutions, and this is true whether or not the same state agency has MOA responsibility for postsecondary as well as secondary subrecipients.

(5) Similarly, not all states have paid adequate attention to state-operated facilities and programs.

(6) Only a few jurisdictions have included proprietary institutions within their subrecipient pool and conducted desk audits and on-site reviews. These are important providers of vocational training which often receive federal funds through state agencies.

(7) The states, in general, do not examine admissions criteria affecting entrance into schools or programs with sufficient care, and often demonstrate the same confusion about the validation requirements for these criteria as have some OCR regional offices. The annual reports do not establish that states have consistently required adequate remedial steps from subrecipients when they do take up these matters.

(8) A number of states have assigned important roles in their MOA process to their Vocational Education Act sex equity coordinators, even though the statute requires these employees (funded by a special "setaside" in the law) to work full-time on other functions. Neither OVAE nor OCR has dealt with this issue despite their knowledge that it is occurring.

(9) A large number of jurisdictions has altered the method of selecting subrecipients for agency-level review from the requirements of the MOP -- especially to coincide with the schedule of program evaluations under the VEA. In at least one instance, this seems to have resulted in completely submerging civil rights concerns when on-site reviews are conducted.

(10) Many compliance plans are too general or do not properly address the concerns identified in on-site reviews, but few states have insisted upon resubmission of plans.

(11) The states particularly need assistance and information about what other jurisdictions are doing with respect to vocational enrollments traditional for students of one sex or the other; too often, remedial plans have been accepted which merely represent that a subrecipient will "study" the problem or "continue efforts" to encourage nontraditional enrollment.

(12) The first five-year cycle of reviews has dealt overwhelmingly with procedural deficiencies (such as failure to appoint necessary grievance officers, publish notices, etc.) and accessibility issues for handicapped students. More complex questions such as funding patterns and program locations remain to be addressed in the future.

(13) Too many annual reports do not meet the requirements of the MOP and fail to provide enough information to permit the Department of Education to make a sound judgment about the quality of state MOA implementation.

There are signs that the MOA process can work. In the states which appear to be most successful to date, a number of typical characteristics can be identified: (a) strong support for the process within the state education hierarchy;

(b) committed, aggressive but tactful staff assigned to these tasks; (c) a financial commitment to the process. There are a number of important and innovative measures which various states have developed that need to be disseminated across the country by OCR, to improve the chances that other states will increase the quality of their own efforts.

Thus, the key to giving the MOA experiment a "satisfactory" rating is guidance and leadership from OCR which will bring the level of performance up to the standards of those states which currently are at the top of the roster.

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Introduction

In 1979, the Department of Health, Education and Welfare issued Guidelines[1] elaborating upon the significance, for vocational education, of the nondiscrimination provisions of Title VI,[2] Title IX,[3] and Section 504.[4] The Guidelines provide interpretations of these laws which are specific to vocational education. The Guidelines also require that each state[5] establish and implement a mechanism to review the delivery of vocational education by school districts, institutions of higher education, and other agencies receiving federal funds -- so as to insure that discrimination is avoided or eliminated. This process represents the first effort by the federal government to involve the states directly in the enforcement of civil rights in education.[6] If it is successful,

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[1] Vocational Education Programs Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap, 34 C.F.R. Part 100, Appendix B; 44 Fed. Reg. 17162-75 (March 21, 1979).

[2] Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, bars discrimination by recipients of federal financial assistance on the basis of race, color or national origin.

[3] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, generally bars discrimination on the basis of sex by educational providers receiving federal financial assistance.

[4] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, bars discrimination by recipients of federal financial assistance on the basis of handicap.

[5] The Guidelines also apply to Puerto Rico, Guam, and the U.S. Trust Territories.

[6] Under Title VII of the 1964 Civil Rights Act, banning employment discrimination, and Title VIII of the Fair Housing Act

[footnote continued on next page]

it may serve as a model for establishing a federal-state partnership in the enforcement of civil rights statutes. If, however, state programs have not been effective in identifying and remedying problems which limit equal access to and participation in vocational education, then at the very least increased monitoring by the Department of Education[7] and assistance to the states to improve their performance is necessary before the concept can be expanded to other areas of federal responsibility.

Over the past year the Federal Education Project has been studying the record of the Department of Education and the states in carrying out the civil rights enforcement provisions of the Guidelines. We have examined the instructions which were given by the Department to the states and the extent to which adequate training and assistance has been made available by federal authorities, as well as the record of the states' own actions. This report presents the major findings of our investigation.

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of 1968, certain state agencies may be approved to conduct initial investigation and conciliation of complaints filed with federal agencies (the EEOC and HUD). However, if the matter is not resolved within a specific time period the federal agency assumes jurisdiction. This is not the pattern under the Guidelines covering vocational education, as we describe in this report.

[7] In 1980 the Department of Education was established and assumed the powers and responsibilities of the former Department of Health, Education and Welfare in the field of education. Unless otherwise specified, the term "Department" in this report refers to the Department of Education.

Civil rights advocates have traditionally been extremely wary of proposals to shift responsibility for enforcement of antidiscrimination laws to the state level, especially in light of the history of southern state resistance to pupil desegregation mandates. Even assuming a considerable and positive change in civil rights enforcement in education, it would be unwise (and probably illegal) for the Department of Education to turn over all of its enforcement obligations to the states for two reasons. First, the fact that antidiscrimination provisions are found in federal laws obligates the Department to enforce them. Second, the federal government has a constitutional responsibility to assure that its funds are not used (directly or indirectly) to support discriminatory activities.

It is therefore critical that the Department continue to play an important role in the process. It cannot treat state enforcement as a stepchild. At a minimum, the Department must monitor and analyze the states' performance and must conduct investigations and compliance activities of its own, as a quality control mechanism and as a source of independent information about the status of vocational education. To assess the Department's readiness to fill this role, we sought to evaluate the quantity and quality of the Department's own vocational education compliance activities since the Guidelines were issued in 1979.

The conclusions which we have reached are based upon a series of interviews with current and former personnel in the Department's Office for Civil Rights (OCR), on-site visits to two states, telephone conversations with officials in a number of other states, and a comprehensive review of voluminous documentary materials which either are generally available to the public or which we secured through requests under the federal Freedom of Information Act. We note, however, that the limited resources of the Project prevented us from carrying out extensive field work as part of this study. We did not, for example, visit school districts or colleges which had been evaluated for civil rights compliance by either the states or by OCR in order to assess the depth and adequacy of these previous compliance activities. Rather, we drew inferences from letters of findings issued by the states or by OCR after completion of those reviews, or from the descriptions of compliance activities contained in the annual reports to the Department of Education which the states are required to file under the Guidelines. We have attempted to be conservative in reaching such inferences and we have sought to avoid categorical statements about the adequacy of the enforcement process in particular states unless the information available to us was sufficient and strongly supportive of our conclusions. Nevertheless, we believe that our research amply substantiates our general assessment of the process of implementing the Guidelines across all of the states.

Chapter 1. Development of the Guidelines

SUMMARY: Federal concern over the use of grant funds to support discriminatory practices first became significant in 1964, when the Congress passed Title VI of the Civil Rights Act. This law banned racial discrimination "under any program or activity receiving Federal financial assistance" and directed all federal grantmaking agencies to enforce the prohibition.

Until prodded by the filing of a lawsuit against it, however, the Department of Health, Education and Welfare made little or no attempt to investigate Title VI compliance in vocational training programs. Over the next half decade the agency's efforts were rudimentary and ineffective. In 1977, following further court proceedings, OCR agreed to gather detailed information about patterns of enrollment in vocational education and to develop an enforcement program.

As part of this program, the Vocational Education Guidelines were issued in 1979 following extensive study and drafting. In addition to substantive guidance about the nondiscrimination requirements affecting vocational education, the Guidelines mandated that each state receiving federal funds must become involved, on a regular basis, in activities to prevent and eliminate discrimination on the basis of race, national origin, sex or handicap in vocational training.

Prior to 1964, in most instances the federal government paid little attention to patterns of segregation or discrimination in public programs supported with federal grant-in-aid dollars. Although some independent federal regulatory agencies issued rulings barring some discriminatory practices,[8] Executive Departments which disbursed federal funds to state, local, or private institutions evidenced virtually no concern for how those funds (or the goods and services which they purchased) were distributed, except for meeting the eligibility requirements of federal laws. Thus, for example, federal "impact aid" funds, made available to local school districts under a program enacted in 1950, were expended by recipients in ways which perpetuated or entrenched the system of racially segregated classes and schools that prevailed through much of the country. Similarly, although Congress had been appropriating money to promote vocational education since passage of the Smith-Hughes Act in 1917, the federal government was indifferent to the widely disparate character of vocational offerings made available to black and white students, respectively.[9] So long as federal funds were used in the general area of vocational training, the fact of racial segregation or discrimination was irrelevant.[10]

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[8] For example, after Brown v. Board of Education, 347 U.S. 483 (1954) was decided, the Interstate Commerce Commission ruled the train and bus companies could not require segregated seating of interstate passengers. NAACP v. St. Louis-S.F. Ry. Co., 297 I.C.C. 335 (1955); Keys v. Carolina Coach Co., 64 M.C.C. 769 (1955).

After years of debate, Congress acted to impose nondiscrimination restrictions upon the use of federal funds. In Title VI of the 1964 Civil Rights Act, Congress provided that:

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[9] *See generally* H. Bullock, *A History of Negro Education in the South* (paperback ed. 1970).

[10] In contrast, the Supreme Court in 1954 had ruled that the federal government was, like the states, constitutionally barred from operating public schools (in this case, the public schools of the District of Columbia) on a racially segregated basis. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI also "directed" every "Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty" to enforce this nondiscrimination requirement.

The immediate impact of Title VI in education was to accelerate the pace of southern school desegregation. Through guidelines or "General Statements of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools,"[11] the Department of Health, Education and Welfare established minimum requirements to be met by all school systems using the "freedom of choice" method of desegregation if they wished to remain eligible for federal funding.[12]

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[11] 45 C.F.R. Part 181 (1965); 45 C.F.R. Part 181 (1966).

[12] The Guidelines called for annual increases in the number and proportion of students exercising the "free choice" option to transfer from racially segregated to integrated schools. 45 C.F.R. § 181.54 (1966). In 1968, the U.S. Supreme Court accepted the basic premise of the HEW guidelines -- that effectiveness in eliminating the existence of segregated schools was the key to the legal sufficiency of any desegregation plan -- and ruled that lower courts could approve "free choice" desegregation plans only if they actually worked. Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968). By 1971 the Court had formulated the constitutional requirement of "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971).

In 1970, a lawsuit was filed on behalf of a group of black schoolchildren and their parents against the Secretary of HEW. The complaint in *Adams v. Richardson*[13] charged that HEW was failing to enforce Title VI by not adequately investigating to determine whether recipients of funds from the Department were discriminating on the basis of race and, if so, taking steps to bring about compliance. The lawsuit not only involved the desegregation of regular classes, but it also referred specifically to the Department's failure to enforce Title VI with respect to vocational schools.[14] The district court ordered HEW to implement a civil rights enforcement program at vocational and other state-operated schools.[15]

Some limited activity by the Department's Office for Civil Rights (OCR) affecting vocational education followed this ruling. In 1974, for example, OCR conducted a survey of some vocational schools and programs, to collect data on enrollments and staffing. By this time, OCR's enforcement responsibilities had been significantly expanded with the enactment of two additional statutes modeled on Title VI: Title IX of the Education Amendments of 1972, barring discrimination on the basis of sex in federally assisted programs[16] and Section 504 of the Rehabilitation Act of 1973, barring discrimination on the basis of handicap. In 1975 and 1976, OCR was ordered by the district court to apply strict maximum time limits to the investigation of discrimination complaints which it received.[17] Because of the backlog of complaints, the agency was forced for many years to devote most of its resources to investigating and resolving them, but since few complaints related to vocational education, OCR's involvement in this field remained minimal.

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[13] Civ. No. 3095-70 (D.D.C.)

[14] *See* *Adams v. Richardson*, 351 F. Supp. 636, 639 (D.D.C. 1972), *aff'd as modified on other grounds*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*).

[15] *See* *Adams v. Richardson*, 356 F. Supp. 92, 98 (D.D.C.), *aff'd as modified on other grounds*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*).

HEW's inaction again led to further court proceedings, in which the plaintiffs explicitly sought to increase OCR's efforts to identify and eliminate discriminatory practices in vocational education.[18] In 1977, OCR signed a consent decree in the case in which it promised to conduct a survey of vocational education in 1979[19] and to conduct agency-initiated compliance reviews annually -- including reviews of vocational schools and programs -- in addition to investigating complaints.[20]

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[16] Title IX, as originally passed and as subsequently amended on several different occasions by the Congress, contains a series of exceptions to and exemptions from the general proscription of distinctions based on sex, none of which are relevant to this report. Indeed, although these exceptions permit a college or school to continue its traditional practice of admitting only students of one sex, they do not allow this treatment in vocational schools (secondary or post-secondary).

[17] See Adams v. Weinberger, 391 F. Supp. 269, 273 (D.D.C. 1975). The 1976 court order came after representatives of women's organizations and groups serving the handicapped intervened in the lawsuit to secure adequate enforcement of the new statutes. OCR's initial response to the previous year's decree setting time frames for complaint investigation had been to claim that all of its resources had to be used, under the order, to investigate allegations of racial discrimination, so that Title IX and Section 504 complaints would be automatically backlogged.

Because OCR had so little experience assessing vocational programs, it was apparent from the outset that it would need to provide specific guidance both to its own staff[21] and to school districts and institutions offering vocational training about the requirements of the laws as they applied to vocational education. Following an extended period of study and drafting, OCR in March, 1979 issued the Vocational Education Guidelines document. The Guidelines contain nine major sections, six of which detail the meaning of the statutory nondiscrimination requirements as they apply to a particular aspect of vocational training.[22] The remaining section is of primary concern in this report. It mandates that each state agency distributing federal education funds[23] must "prevent, identify and remedy discrimination" in its state's vocational education programs through the adoption and implementation of state "Methods of Administration" [of vocational programs] to accomplish this task. As previously noted, the

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[18] In 1976 Phyllis McClure, of the NAACP Legal Defense and Educational Fund, Inc., which represented the plaintiffs in Adams, prepared a report which was highly critical of OCR's inattention to discrimination in state-operated vocational and special-purpose schools. P. McClure, Title VI and Title IX Compliance by the Office for Civil Rights in State-Operated Special Purpose and Vocational Schools Pursuant to Adams v. Mathews (July, 1976). The plaintiffs in Adams also filed a Motion for Further Relief in the lawsuit to obtain a court order for stronger enforcement by OCR in all areas, including vocational education.

[19] By this time, the 1974 data were substantially outdated, as well as being largely inadequate for use in a compliance program because of inaccuracies in reporting, gaps in data submission and methodological flaws.

[20] Adams v. Califano, Civ. No. 3095-70 (D.D.C., Dec. 29, 1977), at 16; see also Adams v. Bell, Civ. No. 3095-70 (D.D.C., Mar. 11, 1983), at 10-11.

[21] Most OCR staff -- and virtually all of those who are involved in compliance reviews and complaint investigations -- are located in its ten regional offices scattered throughout the country. Overall management, policy articulation and quality control are, in theory, provided by the headquarters staff.

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[22] The Guidelines are attached to this report as Appendix A. Parts I and IX describe the institutions and agencies subject to them. Part II requires a state civil rights compliance program in vocational education. Part III sets out standards of nondiscrimination in the allocation or awarding of funds for vocational programs. Part IV establishes criteria for assuring nondiscrimination in the location, construction or remodeling of vocational facilities, and in the access of students to vocational training. Part V describes the obligation of vocational education providers to assure nondiscriminatory counseling and exploratory programs. Part VI covers reasonable accommodation of the special needs of handicapped students, scholarship or other financial aid programs, residential housing, and comparable changing facilities. Part VII deals with equal access and treatment in work study, cooperative and apprentice training, and job placement opportunities. Finally, Part VIII deals with equal employment opportunities, as to which _see generally_ _North Haven Bd. of Educ. v. Bell_, 456 U.S. 512 (1982).

[23] Virtually all federal grant funds to elementary and secondary schools are passed through state-level agencies. Vocational education monies for post-secondary programs also are awarded through state agencies under the Vocational Education Act of 1963, as amended, and the Vocational Education Amendments of 1976. _See generally_ 20 U.S.C. SS 2301 _et seq_.

Guidelines are the first serious attempt by the federal government to require that state agencies dispensing federal education funds act upon their own civil rights obligations to ensure that these funds do not support discriminatory practices.[24]

Just as the Guidelines offer substantive guidance about the application of civil rights statutes to vocational education, they also include some additional information about what sort of compliance activities state agencies must undertake. The Guidelines provide a broad outline, specifying that the states must:

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[24] There was one much earlier effort. After the 1964 Civil Rights Act was passed, HEW attempted to place major responsibility for compliance and enforcement upon state health agencies. The Title VI regulations were drafted to include an MOA requirement and state health and social service units had to submit enforcement plans to OCR. (By the time the Title IX and Section 504 regulations were being drafted, OCR had decided to abandon its reliance upon state agencies, *see* July 8, 1975 letter from Peter E. Holmes to John H. Buggs, *quoted in* U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort -- 1974*, Vol. VI, *To Extend Federal Financial Assistance* 131 (November, 1975), and thus OCR decided not to include such a requirement in the later regulations, an omission which continues to create difficulties. *See infra* pp. 64-69, 101.) Even though OCR supposedly conducted follow-up investigations to check the quality of state efforts, as well as compliance reviews of the state agencies themselves, the program was not very successful; no one would contend that it eradicated discrimination. *See*, *e.g.*, Statement of Roma Stewart, Director, Office for Civil Rights, Department of Health & Human Services, *in* U.S. Commission on Civil Rights, *Issues in Health Care Delivery, A Consultation* 40-42(1980) [identifying continuing discriminatory practices]; U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort -- 1974*, Vol. VI, *To Extend Federal Financial Assistance* 145-63 (November, 1975); U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort -- A Reassessment* 310-16 (January, 1973).

(1) collect data from vocational education providers and analyze those data for indications of potential civil rights noncompliance (a "desk review" or "agency level review");

(2) periodically visit school districts, junior colleges or other institutions offering vocational training to secure additional information which will permit the state agency to determine whether any violations have occurred (the "on-site review");

(3) negotiate voluntary plans to remedy any violations identified or, if agreement cannot be reached, refer the matter to the Department for enforcement;

(4) offer technical assistance to providers of vocational education about how to meet their civil rights obligations; and

(5) periodically report to the Department concerning the state's activities.

The "Methods of Administration" (MOA) plan to be developed by each state, and to be submitted for approval by the Department, is required to provide specific information about how each state will fulfill these obligations.

Chapter 2. The "Methods of Administration"

SUMMARY: The initial task of the states under the Vocational Education Guidelines was to draft, and submit for federal approval, a "Methods of Administration" (MOA) plan describing how each state would fulfill its obligations to monitor the delivery of vocational training and to enforce the applicable nondiscrimination requirements of federal law. OCR sought to employ several mechanisms to assist the states in framing adequate and workable MOAs -- but deficiencies in planning, management and execution sharply restricted their efficacy.

First, OCR reached an agreement within HEW that the substantive vocational education program staff, in the Bureau of Occupational and Adult Education (BOAE), should receive training about and thereafter participate in administering the Guidelines. OCR and BOAE did jointly promulgate, in July of 1979, a Memorandum of Procedures (MOP) providing greater specificity about the required contents of state MOAs but BOAE's subsequent role was minimized because no special training for its staff was ever conducted.

Second, the Department awarded a contract to CRC Education and Human Development, Inc. to provide training to state personnel about the Guidelines and to assist them in developing their MOAs. However, the award was not made until six months after the Guidelines were published and this delay prevented the contractor from conducting its first training session until one month before the MOAs were due to be turned in to the federal government. Thus, most states had already undertaken substantial drafting of their plans before any training took place.

Third, OCR never identified any high-ranking authority within the agency to have the overall responsibility for the MOA process, and, in fact, shifted this responsibility internally (once the Guidelines were issued) to a division with little or no prior involvement in their creation. This failure to provide management leadership and support, combined with the lack of timely training for either BOAE or OCR staff, contributed to the inability of both the training contractor and state officials to obtain clarifications and advice about the MOP or the Guidelines as they attempted to design their own compliance processes.

> Fourth, while the contractor worked intensively with four states and Guam to develop "model MOAs" which it then utilized in its training sessions, no one in OCR or BOAE reviewed and approved these plans before the training was begun. The model MOAs in fact contained some glaring inconsistencies with the Guidelines and other deficiencies which limited their suitability as exemplars.
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> These problems all combined to circumscribe drastically the extent of federal government assistance to the states at the start of the MOA process, and in all likelihood contributed to the substantial delay which then occurred in securing acceptable MOAs from all of the states and in commencing their implementation.

Although education officials in a few states traditionally exercised civil rights enforcement authority,[25] most have had little or no experience in reviewing educational programs to determine equality of access, participation, funding, etc. In fact, the distribution of authority over educational offerings, especially at the elementary and secondary grade levels, varies significantly among the states.[26] For some state agen-

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[25] Typical examples include New York, New Jersey and Massachusetts. Some other states, such as Pennsylvania, have a separate civil rights agency (in that case, the Pennsylvania Human Relations Commission) with jurisdiction over some educational matters. The majority of states, however, provide for no central authority over civil rights in education.

[26] For example, the New York State Commissioner of Education has virtually plenary authority over most aspects of the educational process, subject to judicial review by the state's courts. In some southern states, such as Arkansas, Louisiana and Virginia, school and classroom assignment responsibilities of local officials were preempted by the state in the 1950's in order to assure that schools remained segregated. On the other hand, some states have traditionally vested local districts with almost complete and unreviewable power over all aspects of educational policy. While the recent trend is

[footnote continued on next page]

cies, therefore, the obligation imposed by the Guidelines to prepare and carry out a civil rights enforcement scheme to detect and remedy discrimination by local school districts or educational institutions was a novel responsibility for which their experience did little to prepare them. In every jurisdiction, however, the ultimate responsibility for education lies with the state, usually as a matter of state constitutional provision. Thus, since 1964, the states (which receive and distribute federal funds for education) have had a duty under Title VI to eliminate discrimination and its effects upon educational opportunities,[27] as well as the responsibility imposed by the Fourteenth Amendment to the United States Constitution to provide "equal protection of the laws" to all. Nevertheless, prior to promulgation of the vocational education guidelines, no state had established a mechanism or structure to carry out this federal law obligation.

The Department of Health, Education and Welfare took several steps designed to assist the states. First, because

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clearly in the direction of a larger role for state authorities, there is still no single consistent structure and, at the time the Vocational Education Guidelines were developed, many state education departments had no background in conducting oversight of local programs.

[27] The same obligation attached as to sex discrimination in 1972, when Title IX was passed; and as to handicap discrimination in 1973, when § 504 was enacted. *But see infra* pp. 64-69.

OCR was viewed solely as a compliance agency[28] and also had only limited exposure to vocational education programs, HEW developed mechanisms to involve the "program" side of the Department, The Bureau of Occupational and Adult Education (BOAE)[29] in the process of preparing and implementing the MOAs. BOAE was to serve as a source of information and guidance about vocational education delivery systems[30] for OCR, and as a point of contact between the states and OCR; in addition, BOAE personnel would receive civil rights training so that program staff could play an integral role in the MOA process. Second, in July of 1979, BOAE and OCR jointly issued a memorandum to Chief State School Officers and state vocational education officials describing the "Procedures for Preparing the Methods of Administration Described in the Vocational Education Guidelines." This "Memorandum of Procedures" (MOP), as it came to be called, was drafted in an obvious attempt to avoid overprescription. It contains a series of "must" statements which, taken together, entail the minimum requirements for any plan. It also provides suggestions for additional items for possible inclusion in an MOA. However, the Memorandum did list the necessary elements of an acceptable MOA plan which, the document said, would have to be submitted to HEW by March 21, 1980. Thus, it contemplated that the states would be permitted a year from publication of the Guidelines within which to develop and submit a plan for meeting their civil rights enforcement responsibilities. It also described the respective roles of BOAE and OCR staff once a state's plan to implement the Guidelines was submitted to the federal government: a state's MOA would initially be reviewed by BOAE and then passed on to OCR for final approval.

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[28] More recently OCR has attempted to emphasize the provision of technical assistance rather than investigation, determination and resolution of violations. Whether an agency which has statutory enforcement responsibilities in this important area can successfully combine that role with a "user friendly," technical assistance function is an issue beyond the scope of this report.

[29] Within the Department of Education, BOAE's functions are performed by the Office of Vocational and Adult Education (OVAE).

[30] Under the Vocational Education Amendments of 1976, as well as earlier versions of the Vocational Education Act, the federal government has certain oversight and evaluation functions with respect to state programs. These duties, as well as those relating to the review and approval of state applications and annual programmatic reports, were carried out by BOAE.

The Memorandum of Procedures (attached as Appendix B), fleshed out Part II of the Guidelines by providing more specific information about the contents of an acceptable state MOA plan. Requiring the states to go to the trouble of drafting a detailed planning document is important for several reasons: First, since most state education agencies had little experience carrying out a civil rights enforcement program, the written MOA plan served as the vehicle for articulating how such a program would be managed in each state. Second, by mandating that state officials consider and then describe the personnel within each jurisdiction's educational hierarchy who would be responsible for effectuating Part II of the Guidelines, and how those individuals would go about it, the Memorandum of Procedures increased the likelihood that an effective enforcement program would be conducted. Third, the MOA plan provides a baseline against which each state's enforcement performance can be measured, thus insuring accountability. Of course, these purposes could be realized only to the extent that adequate MOAs were drafted, submitted and implemented.

Since the MOA documents fulfill such a critical function in the enforcement process, it is appropriate to summarize the MOP's mandatory elements here. Each state's MOA document must:

(1) describe how the MOAs were developed and approved within the state;

(2) describe how the state will carry out a vocational education civil rights compliance program, including the names, addresses, titles and telephone numbers of personnel assigned to the program and an explanation of their position within the state's educational agency hierarchy;

(3) identify the persons who will review state-level policies and procedures -- initially by July 1, 1980 and periodically thereafter to cover changes -- to insure that they are nondiscriminatory, including policies and procedures in these areas: funds distribution, admissions, program administration, approval of local activities, and state-operated programs;

(4) show how the state will determine that state-run institutions and programs are run without discrimination;

(5) describe the state's program for ensuring compliance by "subrecipients" (those agencies, school districts, or institutions which receive federal funds from the state) meeting at least these minimal standards:

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a) the state will review statistical data on enrollments, staffing, etc. and other information concerning 20% of all subrecipients each year, so as to identify possible compliance problems or violations warranting an on-site review; the initial "desk audit" reviews should be of subrecipients most likely, according to information available to the state, to have compliance problems;

b) the plan describes the statistical and other information about subrecipients' vocational programs which will be analyzed in the "desk audit," and identifies what sources of this information are available to the state agency;

c) the plan specifies an annual timetable for each phase of the "desk audit" and "on-site review" processes;

d) the state must annually conduct on-site reviews of those subrecipients identified in the "desk audits" as having potential civil rights compliance problems, but in any event must review on-site no less than one-quarter of those given "desk audits" (*i.e.*, 5% of all subrecipients);

e) the MOA must describe lines of inquiry to be pursued in on-site reviews to both explore potential problems identified in "desk audits" in greater depth and also to investigate areas not susceptible to consideration during the "desk audits"; an on-site review should also be used to verify any conclusions of compliance reached in the desk audit;

f) subrecipients must be notified in writing of the conclusions reached in an on-site review and where violations are found, the state must seek to negotiate submission of a voluntary compliance agreement meeting prescribed standards or, if unsuccessful, within 90 days must refer the subrecipient to OCR for enforcement.

(6) provide for the submission of an annual report by each state to OCR containing information in eight specified areas. (Since references to the annual reporting requirements appear in subsequent portions of this paper, details of the MOP provision are omitted here.)

As noted above, the Memorandum of Procedures also contained many additional "suggestions" for inclusion in a state's MOA, while leaving it to the individual states to decide whether, and how, to incorporate them into the structure which each decided to employ.

In general, the Memorandum of Procedures was based upon the operating methods of the Office for Civil Rights, which had been tested and refined by experience. OCR, for example, periodically collects data from recipients of federal funds, either through general survey instruments[31] or by more specific requests for information as part of a compliance review or complaint investigation. This written information is assessed by OCR staff in the regional offices preparatory to any on-site visit to a school district or institution, in order to identify problems warranting intensive investigation, to familiarize the investigative team with an institution's operations, and to save time and expense while "on-site." On-site visits are usually a necessary part of an investigation or review because they permit direct interviewing of teachers, staff, students and others who may have information helpful in determining whether there has been any discrimination.

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[31] Since 1968 OCR has conducted an annual or biennial survey of elementary and secondary school enrollments and staffing, etc., using Forms 101 and 102. As previously noted, a limited survey of vocational schools was taken by OCR in 1974 and a more comprehensive study of vocational course offerings was conducted in 1979. In addition, pursuant to § 161 of the Vocational Education Act, as amended in 1976, 20 U.S.C. § 2391, the Department regularly collects enrollment information concerning vocational programs as part of the Vocational Education Data System (VEDS).

The MOP was a commendable effort by HEW to encapsulate the essential requirements of an effective civil rights enforcement process for the benefit of state educational agencies faced with the necessity of designing such a system for their own states. In retrospect, it is clear that several key errors or omissions in the MOP led to subsequent problems in one or more states, some of which still have not been fully rectified.[32] These problems are discussed later in the body

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[32] For example, even though it is addressed to both Chief State School Officers (whose jurisdiction may be limited to elementary and secondary education) and Executive Officers of State Boards of Vocational Education (who often have only post-secondary authority), the MOP does not deal explicitly with the sharp division of responsibility between secondary and post-secondary vocational programs which exists in a number of states. The Guidelines call only for a compliance program to be carried out by the "state agency responsible for the administration of vocational education." This phrasing may have been based upon § 104 of the Vocational Education Act, 20 U.S.C. § 2304, which requires that a single state agency be designated to submit the five-year program plan required by the statute. However, with the exception of that submission and certain coordination and consultation requirements, § 104(a)(1) of the Act allows this single agency to "delegate any of its other responsiblities involving administration, operation, or supervision, in whole or in part, to one or more appropriate state agencies." In some states, this authority has been fully exercised and the knowledge, expertise and experience necessary to design and operate a compliance program thus is fragmented. As a practical matter OCR has

[footnote continued on next page]

of this report. Apart from such matters, while the MOP shows HEW's recognition that state agencies needed further help in designing compliance and review mechanisms for their own systems, the Department did not act in a timely fashion to provide this assistance.

It was not until September 27, 1979 -- six months after issuance of the Guidelines -- that a contract was awarded to CRC Education and Human Development, Inc. to provide the states with technical assistance in developing their MOAs.[33] Because of this delay, the contractor was not able to conduct the first workshop for state officials until February, 1980 -- just one month prior to the deadline for submission of the MOAs themselves. As the contractor's final report stated, "Training was perceived by most states as being too late."[34]

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permitted these states to submit and implement two different MOAs from two different agencies: one for secondary and one for post-secondary programs. But because neither the Guidelines nor the MOP addressed this contingency, assuring proper coverage of all subrecipients has sometimes been difficult.

[33] CRC's proposal was submitted on August 31, 1979 and the contract award executed by both the government and CRC on September 27, 1979. Nevertheless, CRC's final report to OVAE states that the contract "was not awarded until early November, 1979, a late start that intensified already tight time pressures." Final Report, Contract No. 300-80-0039, July 31, 1980, at 11. We have no explanation for the discrepancy in contract award dates but agree fully with the implication that the contract was awarded far too late to realize maximum benefits to the states.

[34] Final Report, Contract No. 300-80-0039, July 31, 1980, at 48.

Complicating the matter was the unavailability of direct assistance from BOAE or OCR officials, most of whom were completely unprepared to provide it: The contract awarded to CRC called for that organization to provide training about the Guidelines and MOA requirements to BOAE personnel; thus, under the most optimistic projections, until that training was completed most BOAE personnel would lack familiarity with the substantive provisions of the Guidelines and MOP. Because of the limited time available to the contractor, however, no separate training for federal officials was conducted. A few BOAE personnel attended the five regional workshops conducted by the contractor primarily for state officials, but, as noted, these did not commence until a month prior to the due date for the MOAs. OCR also did not conduct an organized training program about the Guidelines and MOA process until September, 1981, well after the submission date, when regional office staff were gathered at the agency's Training Institute in Denver.[35]

It is, therefore, not surprising that CRC's evaluation of its technical assistance effort found that:

> As the states tried to get clarification on these problems [issues unresolved by the broad language of the Guidelines and MOP], they found that most OCR and BOAE personnel were as unsure of the MOA requirements as they were and could not provide any help in answering questions. Furthermore, as-

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[35] Some OCR regional staff attended training sessions conducted by CRC.

> signments to individuals at the federal level had not been made, so there was no single contact point for state officials.[36]

This impression of confusion, uncertainty and lack of adequate planning at the federal level is confirmed by other evidence. For example, in order to prepare materials for its training sessions, CRC decided to work intensively with four states and the Territory of Guam in developing what it termed "model MOAs" which were then used for illustration and discussion in the workshops held in February and March, 1980. It does not appear that anyone at OCR evaluated or approved these "model MOAs" before they were used in the training sessions. In interviews we conducted, OCR personnel suggested that this occurred because the CRC contract was supported by BOAE funds; however, the contract award document identifies OCR as the "contract sponsor" and an OCR staff member as the "Government Project Officer."[37] Moreover, the

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[36] Final Report, Contract No. 300-80-0039, July 31, 1980, at 50.

[37] On the other hand, (1) CRC's Final Report was submitted to OVAE, not OCR; (2) The Project Officer may have been changed after the award was made; (3) The contract number on the final report, 300-80-0039, differs from that on the contract award (HEW-10079-0162) but this is probably the result of renumbering when the Departments of Education and Health and Human Services were created in 1980; (4) The 1979 award document was the only CRC contract furnished to the Federal Education Project in response to an FOIA request; (5) Finally, to add to the confusion, we note that the July, 1980 Memorandum of Understanding between OCR and OVAE (see infra p. 35 & n.46) states that BOAE awarded the contract to CRC.

MOP assigned final responsibility for determining the sufficiency of state MOAs to the Office for Civil Rights.

The MOA effort was not appropriately supported by the agency's top leadership. During this period of time, there were significant personnel shifts at OCR. David S. Tatel, OCR Director since 1977, resigned in September 1979 and Cynthia G. Brown, one of his principal deputies (who subsequently served as Assistant Secretary for Civil Rights in the new Department of Education), left HEW a month later to work at OMB on planning for the transition to a separate Department of Education. Responsibility for the supervision of the MOA process was not placed upon a single individual, without other obligations, who would be able to make it a matter of some priority. In fact, although the policy division had been primarily responsible for preparing the Guidelines, once they had been published in final form the MOA process became the obligation of an entirely different part of the agency, the Office of Program Review and Assistance (PRAS), whose primary mission up to that time had been to offer technical assistance to local recipients of federal funds and to involve other Departmental units in civil rights compliance.[38]

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[38] After Tatel's resignation, Wilbert A. Cheatham, who headed this effort (PRAS) within OCR, served as Acting Director until the appointment of Roma J. Stewart, further diminishing the opportunity for concentrated supervision of MOA submission and approval.

The successful commencement of the new state civil rights enforcement mechanism in vocational education simply was not viewed as a matter of the highest priority in light of competing problems demanding the attention of OCR.[39] As a result, however, no ranking individual in OCR had, as his or her major responsibility, the superintendence of the MOA process. If questions about the substantive meaning of the Guidelines or MOP were received from the states, they would have to be referred to policy personnel for answers; obviously, this unwieldy system never worked effectively. The OVAE employee in charge of the CRC technical assistance contract told the Federal Education Project that OCR "ignored" repeated requests for definite guidance.[40] Again quoting the CRC Final Report: "The corresponding lack of answers about MOA requirements at the national level must be taken into account. . . . The model states could not be confident that our advice would hold up under government scrutiny. Thus, to most effectively implement a model design in the future, an individual with authority to respond to policy questions, and to whom all policy questions should be referred, should be designated by the government." Final Report, at 47.

These management and procedural difficulties clearly had an impact upon the quality of the MOAs submitted by the states. Although CRC prepared generally excellent materials describing, in practical, concrete, and helpful terms,[41] the major requirements for an acceptable MOA under the Memorandum of Procedures and worked closely with officials in the five model jurisdictions, responsibility for preparation of the model MOAs used in the training sessions lay ultimately with the states and Guam. Together with the lack of definitive OCR positions which OCR could communicate on issues troubling the states (*see* text following note 40, *supra*), this meant that the model MOAs which became part of CRC's training materials were not necessarily adequate embodiments of the MOP requirements; OCR apparently made no effort to see that they were. We examined one of the five model plans in detail to assess the extent to which it satisfied the requirements of the Memorandum of Procedures, and we concluded that it was deficient in critical respects. For example, this MOA defined "subrecipients" to include *only* school districts receiving federal Vocational Education Act funds, rather than all recipients of Federal financial assistance (of whatever kind) from the state agency which offer vocational or prevocational training (the Guidelines' definition).[42] It provided no explanation at all of the methods of analysis to be applied to data during the desk review nor any indication of how subrecipients would be selected for on-site review, except to state that those "identified [by desk audit] as having potential compliance problems" would be visited. No lines of inquiry to be pursued in the on-site review were described, probably because the state considered its pledge that on-site reviews would be "led by an individual trained in evaluation procedures" to be sufficient.

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[39] Interviews with Cynthia Brown and David Tatel.

[40] Interview with Paul Gieb.

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[41] CRC's final report says that the process of translating the MOP into this kind of language "proved to be more difficult than we had anticipated because key terms were not defined, and, more importantly, because mandatory requirements were not clearly identified as such. The statements in the Memorandum requiring further interpretation were brought to the attention of OCR and BOAE *and in some cases were resolved*." Final Report, at 17 (emphasis added).

The adequacy of the written MOA document in this particular state was of extra importance because the state planned to rely upon regional, rather than headquarters, staff to carry out the MOA. Since headquarters staff would have played the primary role in producing the MOA, however, the document itself serves as the principal point of reference for those who actually carry out the process. Perhaps not surprisingly, the cursory nature of the state's MOA seems to be reflected in its implementation, as well. The state fell behind schedule in conducting on-site reviews almost immediately; its annual report to the Department for 1983 fails to include letters of findings or voluntary compliance plans -- or even to identify areas of noncompliance with much specificity. While the state's documents do not conclusively establish the inadequacy of the inadequacy of its enforcement program, they provide no basis at all for the opposite inference.

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[42] This is a recurring definitional problem which OCR has never resolved. See infra pp. 70-77.

Another "model MOA" appears to have limited the internal review of state policies and procedures to those explicitly dealing with nondiscrimination requirements or the execution of federally funded programs, rather than including any procedures, policies, etc. which would affect vocational education.

The shortcomings discussed in this chapter may have limited the value of the training provided through CRC's workshops. In any event, most states were well on the way toward completion of their initial MOA drafting by the time that this training was even available. Thus, it does not seem unwarranted to assume that the MOAs initially submitted to the Department reflected the states' efforts to understand and interpret both the Guidelines and the Memorandum of Procedures, with little or no assistance from federal officials. If there were deficiencies or omissions which would limit the efficacy of any enforcement programs, they could be corrected only if the federal government flagged them before approving the MOAs submitted.

Chapter 3. Approval of State MOAs

SUMMARY: The Department of Education prepared for the task of receiving state MOAs, analyzing, and approving or returning them for revision, by developing a simplified checklist itemizing various provisions of the Guidelines or Memorandum of Procedures (MOP) which should be reflected in the MOAs. The checklist format encouraged only a cursory review of the substance of MOA submissions. It also omitted mention of some elements critical to an acceptable MOA.

Although regional offices have negotiated amendments to individual MOAs to correct deficiencies apparently overlooked in the initial approval process, OCR has never considered whether there are problems common to all or many MOAs that require coordinated attention, nor whether the MOP itself should be revised.

Further, the Department decided to have both OVAE and OCR review each state MOA, using the checklist, prior to approval, but OVAE's role was superficial at best and the Department expected OCR to make the real decisions about approval or rejection. OCR, however, did not act with appropriate dispatch; the last MOAs to be approved were not cleared until the summer and fall of 1982. This time lapse caused substantial delay in the implementation of the states' vocational education civil rights review programs since many jurisdictions declined to commence operations and the expenditure of resources until OCR had approved their MOAs.

Unfortunately, the lengthy federal review process did not guarantee that all omissions and deficiencies in the MOAs were identified and corrected. OCR again did not treat the MOAs as high-priority items nor assign substantial headquarters responsibility for their review. Instead, the states' submissions were simply shipped out to regional offices along with the Guidelines, MOP and checklist, notwithstanding the lack of any training of regional office personnel up to this time.

No additional written guidance was provided to regional staff and no one in headquarters was assigned full-time responsibility to answer questions and supervise the process. Perhaps it is not surprising, therefore, that the MOAs initially accepted by the Department often contained errors, omissions and

> inconsistencies with the Guidelines which would severely limit the efficacy of initial state enforcement efforts.

Assuring that MOA plans were adequate and comprehensive was essential if the state civil rights compliance efforts were to be effective. Prompt approval or revision of the MOAs submitted to the federal government was essential to timely implementation. Although OCR guidance or assistance during the year when state MOAs were being drafted was negligible; and although neither OCR nor BOAE undertook to review the model MOAs developed with CRC assistance before they were used in the February-March, 1980 training sessions, shortly before the March, 1980 deadline for submission of the state MOAs to the Department of HEW, OCR produced a "checklist" for use in reviewing the MOAs. This six-page document (attached as Appendix C) itemized 38 separate content areas, drawn from the MOP, to be addressed in each MOA. Each item was to be assessed by checking one of three columns marked, respectively, "Yes," "No," or "N/A" (not applicable). Although limited space for comments was provided, the format of the checklist decidedly emphasizes an examination for facial evidence of inclusion rather than any qualitative evaluation. The checklist does not differentiate between routine items and those which require creative judgment and individualized design by state officials if their MOA is truly to provide the basis for operating an effective enforcement program. Thus, for example, procedural characteristics of an MOA such as the following:

> Provides that a copy of the notification [of the results of a state agency's on-site review] will go to the appropriate regional OCR office

appear to be given equal weight with the key substantive requirement that an MOA describe

> In sufficient detail, state agency plans for meeting its civil rights obligations, including:
>
> > Conducting agency level and on-site reviews.

Moreover, where terms such as "in sufficient detail" appear in the checklist, no definitions or interpretive guidance as to their meaning is provided.

We examined the checklist prepared by OCR carefully, comparing it to the Guidelines and the 1979 MOP. We found that the checklist failed to include some critical elements of an acceptable compliance plan as specified in the MOP. For example, the MOP dictates that state MOAs identify the sources of data (such as enrollment and staffing information for vocational schools) which will be analyzed in the agency-level (desk audit) process. However, the checklist makes no reference to this requirement and at least one MOA which completely omitted this information was approved. The omission is significant, because the quality of the enforcement process is in large measure dependent upon the availability and accuracy of up-to-date data.

While the MOA section of the Guidelines may have been designed by OCR to avoid any necessity for new data collection by the states,[43] as was emphasized to us by several OCR staff, nevertheless if available sources of information are not identified at the planning stage it is extremely unlikely that they will be assembled and used in implementation. Indeed, experience reinforces this conclusion. Adequate desk audits and appropriate selection of subrecipients for on-site reviews in many states have been hampered by the difficulty of obtaining current data on the participation of handicapped, limited-English-proficient, and -- in some instances -- racial or ethnic minority children in vocational education. These difficulties should have been considered and addressed when MOAs were drafted, not several years after implementation began. OCR officials explained the omission of this item from the checklist as an "oversight." However, the MOP has never been updated to correct this or any other omission.

We also found no evidence that the Department has evaluated the adequacy of its MOA standards (as expressed in the Guidelines or the MOP) in light of actual experience and then sought to implement any necessary changes in all states' MOAs to which they would apply.[44]

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[43] Section II.B.1 of the Guidelines requires states to "[c]ollect and analyze[e] civil rights related data and information that subrecipients compile for their own purposes or that are submitted to state and Federal officials under existing authorities" (emphasis added).

[44] Some modifications to individual state MOAs have been negotiated by OCR regional offices. However, OCR headquarters has not attempted to assess these changes to determine if
[footnote continued on next page]

The checklist contains a double set of the columns described above -- one headed "BOAE Substantial Approval Review: Provisions Included" and the other titled "OCR Compliance Review: Provisions Approvable." The form thus reflects the agreement reached between OCR and OVAE[45] concerning responsibilities for examining and approving the states' Methods of Administration documents. That agreement, memorialized in a July, 1980 "Memorandum of Understanding" between the two agencies, provided that OVAE would conduct the initial evaluation of state MOAs and forward its recommendations to OCR which would determine, "in consultation with OVAE," whether to approve or disapprove them.[46] Although the Memorandum of Understanding between the two units is not explicit, it is apparent from the format of the "checklist" that OVAE's role was merely to identify gross insufficiencies or errors in the MOAs; the more searching evaluation of the plans, if there was one, would be done by OCR. We were able to examine

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they were prompted by common or systemic problems and if, therefore, similar modifications should be required in other states' MOAs.

[45] By the time the agreement was executed, the Department of Education had been established and "BOAE" became "OVAE."

[46] The Memorandum of Understanding also contemplated that OVAE would conduct periodic, ongoing monitoring of state MOA implementation and technical assistance to the states, _but see infra_ pp. 82-83, that the two agencies would develop a "data coordination system," that OVAE would participate in complaint investigations or compliance reviews of vocational institutions at the request of OCR, and that OVAE would do an initial review of the states' annual MOA reports before forwarding them to OCR, _see infra_ pp. 85-86.

some of the actual checklists completed by BOAE or OVAE personnel. Our survey indicated that the determination that an MOA was "substantially approvable" was, in fact, a rather superficial one. The Department appears to have approved an MOA so long as it made some reference to each item on the checklist, without considering whether the actual language of the MOA was consistent with the requirements of the Memorandum of Procedures.[47] This part of the federal review process, accordingly, was relatively brief. As the training contractor said in its final report, dated July 31, 1980:

> Many states have reported to us that their MOAs have met with BOAE approval with few minor changes: a few reported approval with no changes or clarification required. In mid-June, 17 MOAs were in the process of revision to meet BOAE approval, and 35 MOAs had been approved and forwarded to OCR. . . .[48]

OCR, unfortunately, did not carry out its MOA approval duties expeditiously. The last MOAs were not given OCR signoff until the summer and fall of 1982. Although some current OCR officials told us that the delay was caused by the need to negotiate changes in roughly 80% of the MOAs as they were initially submitted,[49] this is not a satisfactory explanation. Instead, it appears that decisions by OCR about how to conduct the review and approval process were a substantial factor in creating the delays.

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[47] For example, one MOA declared, with references to the appropriate sections of the Guidelines and the Memorandum of Procedures, that the state in question did not operate any vocational institutions, and thus none needed to be included in the review process. However, another section of the same MOA contained allusions to state-run vocational facilities. The MOA was ruled "substantially approvable" by OVAE.

[48] Final Report, Contract No. 300-80-0039, July 31, 1980, at 41.

First, it is clear that internal planning for handling the submission and approval of the MOAs was interrupted by the split of HEW into the Departments of Education and Health and Human Services. As previously noted,[50] the Director of OCR at the time the Guidelines were promulgated resigned shortly thereafter, and the first Assistant Secretary for Civil Rights at the Department of Education was also away from the agency between October, 1979 and May, 1980.

Second, after the Department of Education was established, vocational education and the MOA process were not matters of high priority which commanded the attention of OCR's leadership.[51] In July, 1980 OCR began sending memoranda to its regional offices, assigning to the regions the responsibility for examining and assessing the sufficiency of the MOAs as they were received, with preliminary approval, from BOAE or OVAE. These memoranda transmitted the state MOA, the completed BOAE or OVAE checklist for that state, and an additional blank checklist. They asked each region to complete the blank checklist within three weeks, evaluating each MOA against the standards and criteria contained in the July, 1979 Memorandum of Procedures. No procedure for review or participation by headquarters staff appears to have been made.

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[49] Cynthia Brown, Assistant Secretary for Civil Rights in the Department of Education from 1980 to 1981, told us that she could not explain the delay.

[50] See supra p.26.

[51] Interview with Cynthia Brown. Ms. Brown characterized OCR as a "troubled agency" at the time of her designation as Assistant Secretary for Civil Rights, facing "crises" concerning its compliance with the investigative and enforcement timeframes of the Adams [v. Richardson] court order, the desegregation of higher education, the "Lau remedies" [services for limited-English-proficient students] paper, and intercollegiate athletics. These critical priorities were addressed by developing written action plans and by appointing highly qualified

[footnote continued on next page]

Third, no guidance or direction was given to regional office personnel other than the reference to the Memorandum of Procedures. Except for the few regional office staff who attended one of the CRC state training workshops, OCR personnel who would have to evaluate the MOAs received no prior training about the process, or about the substance of the Guidelines, from OCR.[52]

Because of these circumstances, each OCR regional office

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personnel within the agency to assume full-time responsibility for their solution. Because the split of HEW into Education and HHS resulted in OCR's having a substantial number of high-level vacancies when it was first created, the same strategy was not and could not be pursued with respect to the "second tier" of "less important" problems, such as the implementation of the vocational education Guidelines and MOAs.

[52] Regional office interviews. Despite the request for action "within three weeks," the regional office personnel with whom we spoke did not recall that deadlines were set by Washington for completing the review process.

was left to work out the application of the MOP to the states' actual submissions by itself and at its own pace.[53] The regions ultimately forwarded the states' MOAs (together with any amendments to them which the regions had requested or negotiated) and a draft letter of approval to Washington; the final acceptance of an MOA was made in writing by the Assistant Secretary.

The failure promptly to secure acceptable MOAs, whether it resulted from procrastination or inefficiency, often had serious consequences for the enforcement process. Many states refused to commit themselves to the expenditure of time and resources necessary to implement their MOAs until they had received final approval from the Department:

> . . . it has been difficult for states to proceed with their proposed MOA plans without final approval from BOAE and OCR. Many states cannot or will not undertake any activities until such approval is received. Although the submission date for the first annual report has recently been extended to January 1, 1981, we strongly urge that the government MOA review and approval process be expedited, so that all states can implement their MOAs with confidence.[54]

Thus, the commencement of any compliance or enforcement activity in a number of jurisdictions was postponed because of delays in securing OCR approval of MOAs.[55]

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[53] The regional office staff were able to call headquarters with questions, which were answered orally "to the best of their ability" by OCR. However, no written guidance was provided; no one worked full time to assure the smooth and effective implementation of the MOAs; and there were and still are issues (e.g., discriminatory funding formulas) about which no one in OCR is in a position to provide guidance or assistance.

[54] CRC Education and Human Development, Inc., Final Report, Contract No. 300-80-0039, July 31, 1980, at 51.

Perhaps the slow pace of federal authorization and negotiation would have been tolerable had it produced important results through careful scrutiny and rigorous review of the MOA submissions. Unfortunately this does not appear to have been the case. We examined selected state MOAs that had been approved by OCR.[56] We found that MOAs received approval though they failed to meet even the simplified requirements of the OCR-produced checklist. For instance, one MOA included nothing about the lines of inquiry that would be pursued in on-site investigations (that is, what subjects would be investigated, what additional data would be collected, what questions would likely be asked, of whom, etc.); it also listed only the state director of vocational education as the person who would implement the MOA and did not list the state statutes and policies relating to vocational education which would be reviewed for possible discriminatory application or effect.[57] Common shortcomings of MOAs receiving OVAE and OCR approval were:

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[55] A September 15, 1981 Memorandum from Antonio J. Califa, OCR Director for Litigation, Enforcement and Policy Service, to OCR Regional Directors on the subject of monitoring the MOAs commented that "the 1980 Annual Reports will often contain sparse or incomplete information because at the time of their submission most MOAs had not been evaluated and approved [by OCR]; and consequently, there would be little activity to report."

[56] We studied the documents provided upon our request or under the Freedom of Information Act; however, in some instances it was suggested to us that the documents we were furnished might have been incomplete because they omitted one or more amendments or supplements required to be adopted prior to formal acceptance of the MOA. OCR headquarters staff, for example, suggested that the "complete" MOA for some states was held in the regional office. On the other hand, some regional offices responded to our FOIA requests by indicating that the relevant material had been forwarded to Washington in connection with our headquarters FOIA. The details are unimportant, but the confusion serves to underscore the fact that the entire process has lacked coherent direction and guidance from OCR leadership to the regions and appropriate accountability by the regions to OCR headquarters.

- Most MOAs we reviewed failed to describe what state rules, regulations and procedures would be examined in the state policy review and did not break down these policies according to the four areas outlined in the Memorandum of Procedures;
- Most MOAs failed to give an adequate description of the method that would be used to review state-operated vocational programs and institutions. Some denied operating any schools; others implied that state-run schools would be lumped into the pool of subrecipients; and many seemed to indicate that states were either confused about the definition of state-operated programs or had not worked out plans to review their own schools;
- Most MOAs failed to commit the state to conduct all necessary on-site reviews; that is, reviews of all subrecipients identified at the agency level as having potential compliance problems. One MOA referred to limited resources and personnel as the reason;
- Some MOAs failed to indicate what documents or data the state planned to analyze during the agency level reviews;
- Some MOAs failed to state what agency level findings would trigger an on-site review;
- Some MOAs failed to describe the general areas of inquiry to be pursued during the on-site reviews;

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[57] The same MOA was internally contradictory with respect to state-operated vocational facilities. See supra note 47.

- Some MOAs failed to indicate what problem areas, not addressed at the agency review level, might be noted for review at the on-site level;
- Some MOAs scheduled on-site reviews too late to make it possible for the state to provide adequate annual reporting of on-site findings and voluntary compliance activities;
- Some MOAs failed to provide a specified time frame for the submission of voluntary compliance plans by subrecipients found to be in noncompliance;
- Some MOAs did not fully describe how the state will negotiate voluntary compliance plans;
- Most MOAs failed to give a well-defined description of the state's technical assistance program;
- Many MOAs failed to promise that the states would include, in their annual civil rights compliance report to OCR, findings from on-site reviews; as late as 1983 some annual reports to the Department included only vague summaries of findings;
- Many MOAs failed to bind the states to attach copies of voluntary compliance plans completed by subrecipients to their annual civil rights compliance report to OCR; again, many 1983 annual reports omitted them;
- Many MOAs implied that the state will conduct compliance activities only for Vocational Education Act state-plan vocational programs and institutions, even though the civil rights laws apply to any program receiving federal funds, regardless of whether those funds are VEA funds or others.[58]

Deficiencies in the scope or substance of the MOAs represent more than a paper problem. Although a defective MOA plan would not prevent state personnel who seek to implement it from following the Guidelines and Memorandum of Procedures -- and thus, in effect, modifying the MOA in practice --

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[58] See infra pp. 70-77.

this course was hardly likely. Most states had never before either designed or implemented civil rights compliance activities. Personnel assigned to the task often would not have been previously involved in the planning or MOA-drafting effort. Training from the federal level -- either in investigative methodology or about the substantive coverage of the Guidelines -- was sharply limited. For these reasons, it would have been unrealistic to have expected most state education staff to have undertaken more than literal compliance with the state's own MOA commitments. But, for the same reasons, it would thus have been most unlikely for actual implementation to have cured problems in the MOAs.

The underlying purpose of the MOA submission was to provide a structure for the necessary planning and analysis which had to take place in each state in order to fashion a workable civil rights compliance process for vocational education in that jurisdiction. If inadequate resources went into the design stage, then difficulties in the implementation phase were a virtual certainty. Failure to identify available sources of data to be scrutinized in desk audits, for example, and to conduct the necessary preparatory work so that these data would be retrievable when MOA implementation began, would lead to inadequate agency-level reviews, failure to observe patterns indicative of the need for followup through on-site reviews, and, ultimately, to the loss of opportunities to end discriminatory practices.

After the first year or two of implementation, and especially from mid-1982 on, some regional offices of OCR began to negotiate changes in state MOAs to correct or strengthen them. Many of the changes thus made related to portions of the MOAs which were inadequate when submitted, demonstrating the price paid by the Department for its cursory treatment of MOA submissions and approval in 1980.

Chapter 4. Training for Implementing the MOAs

SUMMARY: Submission of MOA plans was only the first step in the state enforcement process; it had to be followed by effective implementation by knowledgeable personnel. Yet OCR waited until 1981 before seeking to provide training to the states for implementing the MOAs. On September 30 of that year the agency finally awarded a contract to the American Coalition of Citizens with Disabilities (ACCD) for written materials and six three-day workshops.

However, in late February, 1982 (two years after the MOAs should have been submitted and approved, and their implementation begun), OCR had to reject inadequate draft compliance and technical assistance manuals prepared by an ACCD subcontractor. Within the next six weeks a new subcontract was let and two new documents -- the only written materials supplementing the Guidelines and MOP ever distributed by OCR -- were rushed to completion in time for the workshops.

While these sessions were generally regarded by state personnel as helpful, there are major inconsistencies between the written documents and the Guidelines and MOP -- including some in critical areas such as the selection of subrecipients for desk audits and onsite reviews, the definition of "subrecipients," and the nature of vocational education "programs" which should be reviewed under the MOAs. The Compliance Manual and Technical Assistance Handbook prepared under this contract also omit any discussion of important subjects such as discriminatory state funding patterns (because, the contractor claimed, OCR was unable to provide guidance and directed that the matter simply be dropped from the written materials), and the presumption of discrimination where enrollment patterns in previously one-race or single-sex schools are unchanged.

Despite the recommendations of ACCD, the Manual and Handbook have never been updated to reflect recent legal developments or to correct these deficiencies. Nor has OCR undertaken (nor has it any current plans to undertake) any additional formal training for state personnel -- again contrary to the explicit recommendations of both ACCD and CRC.

Because of the problems previously noted, the CRC training was not timely and was less comprehensive than had originally been contemplated. Fewer workshops than initially specified in the contract could be conducted, and the focus was upon *planning*, rather than *implementing*, a civil rights compliance program. CRC itself recommended that additional training be made available to state personnel.[59] OCR recognized the need but did not even issue an RFP (Request for Proposal) for additional state-level training until 1981. On September 30, 1981 a contract was awarded to the American Coalition of Citizens with Disabilities (ACCD) for this purpose.[60]

This contract called for the preparation of a compliance and technical assistance manual reflecting the substantive content of the Vocational Education Guidelines and underlying civil rights laws, as well as the presentation of a series of workshops for state personnel throughout the country.

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[59] Final Report, Contract No. 300-80-0039, July 31, 1980, at 56-57.

[60] The training did not begin until two years after the CRC workshops. It is difficult to assess responsibility for the delay in providing additional training. One factor appears to have been the confusion attendant to reorganization of OCR when a separate Department of Education was created. Another was the relatively low priority of vocational education compared to other critical concerns, *see supra* note 51 and accompanying text. Third, everything may have slowed down after the change of national administrations in 1981. (Cynthia Brown recalls approving the second RFP while still in office but it was not released until after her departure.) As early as the CRC workshops in February and March, 1980, however, the need for additional assistance to the states should have been evident to OCR.

As finally amended, the agreement required the contractor to present six three-day workshops in May and June, 1982 at which the written materials would be disseminated and explained. Whether or not this schedule, as originally conceived, was too ambitious, and whether or not it allowed adequate time for preparation and presentation of the subject matter, this technical assistance contract was beset by particular difficulties.

The initial draft of separate compliance and technical assistance manuals prepared by a subcontractor to ACCD was submitted to OCR in late February or early March, 1982. After an internal review, the contractor was informed that OCR found the work unacceptable and unsuitable for use as part of the training process.[61] The subcontract was terminated and a new team selected to prepare manuals and conduct the training. As a result of these problems, however, an entirely new set of written materials had to be developed -- at the same time as a format and handouts for training sessions were being devised -- within about six weeks.

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[61] OCR officials also objected to specific sections of the manuals because they were inaccurate representations of federal policy and because the documents were extraordinarily theoretical and complex. They attempted, for example, to articulate in considerable detail the legal concepts surrounding the collection and maintenance of enforcement data in a format suitable for introduction in court proceedings. They also sought to classify discrimination prohibited by the Guidelines and underlying federal civil rights statutes into one of four general categories through a rather abstract analysis rather than the use of concrete examples. While the subcontractor was a former Director of OCR in the Department of HEW, the criticisms appear to us to have been justified.

The final product -- a Compliance Manual and a Technical Assistance Handbook for "Implementing Section II-B of the OCR Vocational Education Guidelines," are the only interpretive documents beyond the Guidelines and the MOP which the Department has ever officially released to the states.[62] The Manual and Handbook are a significant improvement over the initial subcontractor's versions; they are at least comprehensible and organized in the same fashion as the Guidelines and MOP. While they do not attain great substantive depth, they were probably never designed for use beyond the initial set of workshops for state personnel.[63]

Inaccuracies, problems and ambiguities in these materials are of the utmost significance, however, precisely because they have not been updated and because OCR regional offices are still suggesting them to the states as reference standards. Particularly important are inconsistencies or apparent contradictions between the Manual or Handbook, on the one hand, and the Guidelines or MOP, on the other. Regrettably there are a number of such incongruities. For example, with respect to agency-level reviews, the Manual at p. 9 says:

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[62] Over the past four years several versions of a draft investigative manual for vocational education have been prepared within OCR but none has ever been issued in "final" form.

[63] The contractor recognized that the compliance manual should be updated on a regular basis and that training (basic, intermediate and advanced) should be continued in the future. Draft Final Report, Contract No. 300-81-0446, July 14, 1982, at 22-24.

> Identifying the 20% of the School Districts Subject to the State Level Review
>
> The next step in the process is to determine which school districts should be included in the state level review. Each MOA will prescribe the criteria the State employs for inclusion and exclusion of school districts. While some State have divided the school districts into geographic regions, others have devised a process of using educational levels and enrollment patterns, or have even relied on random factors.

This language fails to reflect the mandatory terminology of the MOP specification that each MOA should describe how subrecipients will be selected for agency-level reviews by a "method [which] must be designed to reach, at the earliest possible date, those subrecipients most likely to have compliance problems" (emphasis in original).[64] Indeed, it seems clearly to suggest that either geographic or random selection of subrecipients for desk audit would be an acceptable method of MOA implementation, contrary to the explicit and emphatic phrasing of the MOP.

The passage quoted above also suggests another weakness of the Compliance Manual: it refers only to "school districts" even though subrecipients under the Guidelines may include not only public school systems but also public or private post-secondary institutions, area-wide technical institutes, proprietary schools, and public facilities such as juvenile homes. Although the definitional section of the Manual is not this narrow, the use of the term "school district" as a generic substitute for "subrecipient" is an unfortunate choice of language which may have reinforced some states' doubts about the scope of coverage under the Guidelines. Two points are significant: First, the problem was not identified by OCR in the initial review and editing which took place prior to the ACCD workshops. Second, the problem has not been corrected because, notwithstanding the contractor's recommendations, the materials have not been revised or updated since they were prepared two years ago.

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[64] July, 1979 Memorandum of Procedures issued jointly by OCR and BOAE, at 8.

Another instance of conflict between the ACCD Compliance Manual and the MOP concerns on-site reviews. The Manual at p. 16 says:

> If the State level review identifies considerably more than 5% of the districts with potential violations, and it is not feasible for the State to conduct on-site reviews of more than 5%, then the following procedure is recommended. The letter to the school district (1) would indicate that no on-site review will be scheduled that year, (2) would identify the potential compliance problems, (3) would request a self-evaluation, and (4) would request the district to submit the evaluation to the State.

The Memorandum of Procedures, however, was very specific about the obligation to go on-site whenever the data examined in the desk audit indicated the likelihood that there were compliance problems:

> C-2. Selection of Subrecipients for Review
>
> The MOA must provide for on-site review of all subrecipients for which the agency level review

> indicates compliance problems. Among the agency level findings that should trigger an on-site review are: [10 examples given][65]

Thus the Manual suggests to states that even potentially serious problems of discrimination may be ignored, except for the suggestion of subrecipient self-evaluation, if on-site review "is not feasible."[66] The document also includes some

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[65] *Id*. at 15-17. On the other hand, the contractor told us that at a meeting a week before the first workshop, OCR officials said that OCR itself would not expect states to do more than 5% on-site reviews even if desk audits revealed a larger number of potential compliance problems.

[66] The Manual's apparent authorization for state agencies to act contrary to the MOP is compounded by the language of the MOP itself, which contemplates (at p. 13) only three possible outcomes of a desk audit -- stated in terms of the notification which would be provided to a subrecipient: *first*, that "because no violations were *shown* by the [desk] review, there will be no on-site review . . ." (emphasis added); *second*, "that although the agency level review revealed no *apparent problems*, the subrecipient will nevertheless be the subject of an on-site review" (emphasis added); or *third*, "that the agency level review revealed some *possible violations* (to be listed)" and an on-site review would be done (emphasis added).

As the italicized language indicates, the circumstances in which on-site reviews are mandatory are not crystal clear under the MOP, especially when the wording quoted in this footnote is compared with that set out in the text, *supra*, at note 65, *viz*., on-site review must be conducted when desk audit "indicates compliance problems." Certainly the Manual's suggested approach to that category of instances in which the desk review does not "show" a violation," but provokes the thought that there could "possibly" be one, is much preferable to the MOP's rigid tripartite categorization. The Manual proposes that state agencies request subrecipients to conduct and report to them on self-evaluations when the desk audit seems to demonstrate something less than a likely violation but also less than full and equitable participation by all groups in the vocational offerings of a subrecipient.

While the authors of the Manual thus should be commended for their creative approach to this problem, the fact remains that the "not feasible" language of the document is easily

[footnote continued on next page]

of the confusing and complex discussion that appeared in the earlier subcontractor's draft.[67]

The Manual and Technical Assistance Handbook are incomplete because they do not address all of the substantive content areas of the Guidelines. For example, they do not provide guidance about what funding patterns may be discriminatory,[68]

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susceptible to an interpretation which would excuse the failure to undertake an on-site review of a district or institution which appeared, in the desk audit, to have a potentially serious compliance deficiency, so long as the minimum 5% figure were met. (And since the authors' solution -- a request for self-evaluation -- is a departure from the strict requirements of the MOP, it can simply be ignored.)

[67] For example, we have already adverted to the confusion over whether the MOAs should apply only to subrecipients which get federal Vocational Education Act funds. _See supra_ pp. 29, 42. On this subject the Manual provides little clarification (pp. 8-9):

> In some States this definition of the universe of "covered" agencies and schools will result in the State agency including in its compliance review jurisdiction districts or institutions that may not receive any Federal Vocational Education Act funds from the State agencies, but do receive funds from the (separate) State Educational agency under Title I of the Elementary and Secondary Education Act. The Department of Education expects that any potential problems caused by this jurisdictional anomaly will be eliminated by a combination of formal and informal cooperation between the State agency and a separate State educational agency.

(Of course, Title I was not the only other source of Department of Education funds to a subrecipient.)

[68] The subcontractor responsible for the preparation of the Manual told us that OCR instructed that funding should be omitted because OCR itself lacks the necessary knowledge and experience to deal with the subject in compliance reviews. Federal officials to whom we spoke confirmed that OCR could not offer technical assistance to state MOA personnel in this area. Our research revealed no steps being taken or contemplated to develop this aspect of the Guidelines.

nor do they mention the presumption, under the Guidelines, that

> A vocational education center, branch or annex, open to all students in a service area and predominantly enrolling minority students or students of one race, national origin or sex, will be presumed unlawfully segregated if: 1) it was established by a recipient for members of one race, national origin or sex; or 2) it has since its construction been attended primarily by members of one race, national origin or sex; or 3) most of its program offerings have traditionally been selected by members of one race, national origin or sex.[69]

The Manual does suggest that the desk audit include a comparison of enrollments in "each vocational education program, as defined by a sequence of courses leading to an occupational objective" (p. 12). The quoted phrasing improperly incorporates into the Guidelines context the narrow definition of the term "program" under the Vocational Education Act, a definition never designed for nor intended to apply in the MOA context. Taken literally, this language would exempt from desk audit scrutiny traditionally single-sex exploratory vocational offerings such as home economics and industrial arts, despite the lasting impact upon students' career choices of these early experiences. Moreover, in the same section this guidebook further confuses the issue by suggesting (at p. 14) that "cosmetology" and "health occupations" are two "programs." The categories represent substantially different levels of specificity within the nationally standardized taxonomy of vocational training.[70] Because historic patterns of course enrollment or the results of biased counseling, for example, may be much more easily submerged in data collected for the more general level of specificity,[71] the Manual should have avoided using the two categories interchangeably.

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[69] Vocational Education Guidelines, § IV.H., 44 Fed. Reg. at 17166.

Finally, and without exhausting all of the possibilities, we will also mention here only two more items: First, the Manual fails to include, in the section describing information which (if available) should be considered in the desk audit, non-statistical reports or complaints furnished by outside groups.[72] Second, the discussion of employment coverage under Title IX and Section 504 is out of date. The Supreme Court has ruled that both laws bar employment discrimination based on sex or handicap by recipients of federal financial assistance, regardless of whether students are affected[73] but OCR has neither updated the Manual nor amended it through supplementation.[74]

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[70] Vocational education is subdivided into seven general areas, each of which employs a distinctive "two-digit U.S. Office of Education Code." These areas are Agriculture (01.), Distribution (04.), Health Occupations (07.), Home Economics (09.), Office Occupations (14.), Technical (16.), and Trade and Industrial (17.). Each general area is further subdivided into individual courses of study, identified by a "six-digit OE Code" utilizing the two digits for the general area plus four additional numerals. Thus, for example, cosmetology is given the number 17.2602 and is within the Trade and Industrial Area, while the 1979 survey of vocational education enrollments conducted by OCR included 16 separate courses of study plus one catchall category within the area of Health Occupations.

[71] That is, by two-digit code.

[72] The MOP explicitly suggests that states consider "reports of possible noncompliance obtained from complaints filed by parents, students, civil rights groups, or others;" "reports from State civil rights agencies or State advisory committees that raise questions about potential civil rights compliance problems;" and "information or reports on subrecipients from OCR that indicate possible compliance problems."

Despite these shortcomings of the written materials, the workshops run by ACCD for state personnel in the spring of 1982 were generally well received, particularly by those many individuals who had been assigned to MOA responsibilities after their state's plan had been devised and who therefore had no opportunity to attend the CRC workshops in 1980. Included in the workshop was a case study exercise, using simulated data and interview notes from a hypothetical on-site visit.[75] For those state representatives with substantial previous experience in carrying out the MOAs, greater depth of coverage would have been preferred[76] but most workshop participants were grateful for the chance to share experiences with one another. Particularly helpful was the fact that one of the workshop leaders had first-hand experience with the MOA process in one state since its inception.

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[73] *Consolidated Rail Corporation v. Darrone*, 52 U.S.L.W. 4301 (U.S. February 28, 1984); *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982). Title VI contains an express exemption from coverage for employment unless the purpose of the federal financial assistance is to provide employment; the statute has been interpreted to cover employment discrimination which affects students (as, for example, by maintaining an all-white teaching staff in a school).

[74] *See* Draft Final Report, Contract No. 300-81-0446, July 14, 1982, at 22 ("With all the recent Supreme Court decisions, the training manual needs to be revised, particularly in the employment areas"); *id*. at 25 ("Many SEA's expressed a need for media to be developed that addresses Title VI, Title IX, and Section 504 issues regarding the implementation of the *Guidelines* in vocational education").

[75] It is more than a little ironic that this first "hands-on" training for state personnel was not made available until some two years after the Guidelines and MOP required that state compliance programs be instituted.

There has been no further, organized training provided to state personnel, either by an outside contractor or by OCR or OVAE.[77] We have emphasized formal presentations in group sessions in this chapter because that has traditionally been the preferred method of presenting instruction in an entirely new subject matter area. Although state MOA coordinators and other personnel connected with the program have always been free to contact individual staff within OCR regional offices for assistance, at least in 1980 and 1981 there was widespread dissatisfaction among state officials with OCR's ability to give clear answers to policy questions.

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[76] Similarly, a number of the sample questions to be asked during on-site reviews that are contained in the Manual used during the training sessions do not probe deeply for evidence of discrimination, and some appear to contain within them suggestions of the "proper" (nondiscriminatory) response.

[77] OCR has no present plans to furnish such training. As described later in this report, the agency has abandoned the practice of contracting with individuals or organizations outside the government to perform such tasks, in order to reduce expenditures. See infra pp. 117-119. OVAE no longer plays a significant role in the MOA process, see infra pp. 82-86, and to our knowledge also has no plans to provide training to the states. While OCR has suggested that it will replace external technical assistance with help from its own staff, there are considerable problems of structure, expertise and leadership that provide grounds for doubting the efficacy of such an effort. See infra pp. 114-120.

In some instances, according to our interviews, states asked for in-person assistance but were told by OCR regional offices that there was no travel money in the federal agency's budget which would permit such a visit. Solely on the grounds of efficiency, group training in the basic substantive areas covered by the Guidelines and in the techniques of data collection, investigation, maintenance of files and preparation of appropriate conclusory documents and periodic reports is more sensible than individual instruction, though not even that is occurring. The OCR contractors for the training that was provided both in 1980 and in 1982, as well as the state personnel to whom we spoke, recommended that additional formal training should take place. Instead, OCR apparently has decided to rely solely upon "technical assistance" to be provided on an individual, "by-request" basis from OCR regional offices. We assess the capabilities of this system later in this report.[78] Before turning to that subject, however, we consider the extent to which OCR's own personnel have been given appropriate guidance about vocational education issues.

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[78] See infra pp. 108-120.

Chapter 5. Training and Guidance for OCR Staff

SUMMARY: OCR was equally remiss about preparing its own personnel to assist and supervise the states in their implementation of the MOAs.

Although the Guidelines and MOP were drafted by headquarters staff in Washington -- while responsibility for monitoring state activities would, like the earlier task of reviewing MOA submissions, be assigned to the regional offices -- no training for regional office employees was scheduled until September, 1981, a year and a half after MOA implementation was due to begin. That session utilized a draft manual for federal investigations of vocational education providers which contained only a brief addendum about the MOA process, and no further training was offered during the five-year period from 1979 to 1984.

Although John Scheldrup and David Gerard, in the headquarters office, tried to respond to telephone inquiries from the regions to the best of their ability, neither was assigned full-time responsibility for the MOA effort nor vested with authority to make policy decisions as they arose. As a result, it has been very difficult for both the OCR regional offices and for the states to obtain answers to questions and guidance from headquarters.

In fact, it has taken the agency inordinate lengths of time to make decisions about how the Guidelines and MOP are to be interpreted, as graphically illustrated by the experience of OCR with two New Mexico problems.

First, when the Guidelines were issued in 1979 HEW indicated that the Title IX and Section 504 regulations would be amended to include an explicit authorization for the MOAs. When this had not been accomplished by December, 1980, OCR decided it had no choice but to accept a New Mexico submission that proposed to limit the state's MOA activity to Title VI problems only.

Incredibly, and despite Education Secretary Bell's announced interest in a greater state role in civil rights enforcement, the regulations still have not been amended. Moreover, OCR has adopted an extremely restrictive interpretation of its enforcement authority in the absence of such a regulatory change,

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> virtually abandoning any effective monitoring of state activities under Title IX or Section 504.
>
> *Second*, in 1982 the regional office in Dallas discovered that New Mexico was reviewing only postsecondary institutions because it limited "subrecipients" under its MOA to schools and districts receiving *Vocational Education Act* funds, despite the clear language of the Guidelines to the contrary. The regional office secured advice from Scheldrup and concluded that secondary school districts should also be subject to the MOA procedures.
>
> However, instead of insisting upon its -- and Scheldrup's -- interpretation, the region referred the matter to headquarters in November, 1982, where it languished until February, 1984 before OCR officially decided that Scheldrup's view had been correct! The same issue had arisen in other states, and other OCR regional offices had taken a different view, but apparently this was beyond the knowledge of headquarters.
>
> The combination of almost no staff training, no clearly defined MOA authority and responsibility at headquarters, no effective review of what the regional offices are actually doing, and the requirement of headquarters' prior approval for any MOA enforcement against the states, has resulted in stifling effective federal leadership and assistance to the states.

When the Vocational Education Guidelines were issued by OCR in 1979, the agency's own experience in the area was minimal. Three years after the initial *Adams* court order directing OCR to establish a compliance program covering state-operated special and vocational schools,[79] virtually no attention had been paid to one-race or single-sex vocational schools[80] -- institutions likely to have practiced or been affected by the grossest kinds of civil rights violations. More subtle or intricate problems in vocational education were completely ignored. Although OCR had drafted a vocational-technical school compliance manual for internal use, it lacked major policy development in important areas.[81] Five "pilot reviews" had been done by headquarters staff in order to gain expertise, but they failed to probe deeply and did not lead to the articulation of substantive policies to guide OCR's regional offices, which had such responsibility as there was to review vocational institutions on a regular basis.[82] As a result, the limited number of reviews that had been conducted by regional office staff ignored significant concerns later addressed in the Guidelines, such as schools' relationships with segregated unions offering apprenticeship training programs on school premises, etc.[83] Then, as now, there was no "quality control" program which involved headquarters review of regional office activity in the area of vocational education to assure consistency and coherence. The understanding of what Title VI, Title IX and Section 504 required of vocational educators varied considerably among the OCR regional offices. These circumstances had not been altered by the time the Guidelines were issued in 1979.

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[79] *See supra* note 15 and accompanying text.

[80] P. McClure, *Title VI and Title IX Compliance by the Office for Civil Rights in State-Operated Special Purpose and Vocational Schools Pursuant to Adams v. Mathews* 21-22 (July, 1976).

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[81] Id. at 22-25.

[82] Id. at 27-48.

[83] Id. at 48-71.

Since the Guidelines were produced by lawyers in the policy division of OCR headquarters and were then sent to the regional offices, it is obvious that some form of internal training for regional office personnel was advisable, if not absolutely necessary. The need for guidance was increased after the Memorandum of Procedures was published in July, 1979, for OCR had virtually no prior experience superintending the establishment and implementation of a state civil rights compliance program. Nevertheless, OCR did not schedule any training for its own regional office personnel about the Guidelines or MOP until September, 1981, when one meeting was held at the agency's Training Institute in Denver.[84] By that time, regional offices were already supposed to be analyzing the initial reports on MOA implementation by the states[85] and were supposed to have completed the review and approval of the MOAs, as described in Chapter 3.

The basic materials for the training session consisted of a draft compliance manual prepared within OCR; however, this manual has never been issued in "final" form by the agency, so that the substantive positions reflected in it cannot be assumed by regional personnel to have the *imprimatur* of the Department.

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[84] Thirty staff members from among the ten OCR regions attended the Denver workshop.

[85] *See infra* pp. 83-84.

The draft compliance manual used at Denver is concerned primarily with the standards and methodology for conducting OCR's own compliance reviews of institutions offering vocational education. It does contain an "addendum" entitled "The Review of State Agency Recipients" which mentions the MOA process. However, suggestions for evaluation of state MOA programs are limited to a one-page checklist with items such as the following, to be answered either "yes" or "no":

> Does the recipient conduct periodic compliance reviews of selected subrecipients (II-B-2)?
>
> > Was the review effort reasonable (20 percent of all subrecipients each year or other standard established in the approved MOA)?
> >
> > Were appropriate issues investigated?

(The checklist does not inquire whether on-site reviews were even conducted.) Perhaps the most fascinating aspect of this draft investigative manual is the declaration that "[State agency responsibilities regarding the administration of grants or the distribution of vocational education funds, as set out in Section III of the Guidelines, will be addressed in a manual being prepared by OCR under separate cover."[86] No further policy on funding disparities has ever been provided by OCR, either to its own staff or to the states.

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[86] June 30, 1980 Draft Investigative Manual for Determining Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap in Vocational Education Programs, at 46.

OCR officials in Washington told us that when problems concerning vocational education or the MOAs arose in the regional offices, staff members generally called either John Scheldrup or David Gerard in the OCR headquarters. The regions confirmed that this has been the practice, and that the national office was generally as responsive as possible. For the same reasons that we suggested above, however, we do not believe that individual assistance is an approprite substitute for adequate formal training of OCR's own staff any more than it is for state personnel, especially if the regional offices bear the major responsibility for (1) determining if states are complying with their MOAs, the Memorandum of Procedures, and the Guidelines, and (2) furnishing assistance to the states to improve their procedures and eliminate deficiencies. Additionally, the process of checking with headquarters is an entirely informal one that has never been regularized. Neither Scheldrup nor Gerard, for example, was ever officially designated to supervise the MOA compliance program or given appropriate authority to make decisions. As a result, there have been a number of instances in which they, and OCR generally, have been unable to resolve questions that have arisen in the course of MOA implementation. The experience with one state, in particular, deserves more extensive discussion here, because it demonstrates both OCR's inexplicable tardiness in addressing problems and also the inability of OCR's headquarters staff to resolve issues arising in the regional office review of state MOA compliance.

OCR has been aware since the Guidelines were issued in 1979 of questions about its authority to require that state MOA compliance programs encompass Title IX and Section 504 as well as Title VI. The explanatory preamble to the Guidelines published in the *Federal Register* on March 21, 1979 contains the following statements (44 Fed. Reg. 17163):

> . . . The second requirement -- monitoring subrecipients for compliance -- derives from the Department's Title VI regulation which provides in subparagraph 80.4(b):
>
> > Every application by a State or State agency to carry out a program involving continuing Federal financial assistance * * * shall * * * provide or be accompanied by provision for such methods of administration * * * as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.
>
> Thus the Department's Title VI regulation requires State agency recipients to adopt and obtain Department approval for methods and procedures through which sub- recipients can be monitored for compliance with civil rights authorities.[1]
>
> ---
>
> [1] Although the regulations for Title IX and Section 504 do not assign a similar responsibility to State agencies, the Department intends to issue a Notice of Proposed Rulemaking to eliminate this inconsistency with Title VI. If revisions to the Title IX and Section 504 regulations are not adopted by the Department, these Guidelines must be revised.

On February 6, 1980, the Federal Education Project, the Project on Equal Education Rights, the NAACP Legal Defense and Educational Fund, Inc. and the American Coalition of Citizens with Disabilities had written to Roma Stewart (who had succeeded David Tatel as Director of the Office for Civil Rights in HEW) with copies to HEW Secretary Patricia Harris and Department of Education Secretary-Designate Shirley Hufstedler. Their letter quoted the footnote from the Federal Register and urged the Department to amend the Title IX and Section 504 regulations promptly. On March 20, 1980, Ms. Stewart responded that a proposed NPRM to amend the regulations had been circulated within the Department of HEW in August, 1979 but had never been issued because of problems raised by the Assistant Secretary for Education. Although this letter reported that "we are now in basic agreement with the Department of Education staff and are preparing to resubmit a proposed NPRM for clearance in the near future," it recognized that the regulations had not been amended prior to the deadline for submission of state MOAs. Nevertheless, it stated, "we are encouraged by reports that many state vocational education agencies have been working on Methods of Administration for Title IX and Section 504 as well as for Title VI."[87]

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[87] The letter also enclosed a March 10, 1980 memorandum from the Deputy Commissioner of Education for Occupational and Adult Education to Chief State School Officers, State Directors of Vocational Education, etc., which admitted that the regulations had not been amended but recommended:

> Since you have been working on MOAs for Title VI, Title IX, and Section 504 and because we anticipate that amendments to the regulations for Title IX and 504 will be forthcoming, we encourage you to comply with the March 21, 1980 deadline for submission of MOAs for Title IX and Section 504 as well as

[footnote continued on next page]

New Mexico originally submitted its MOA in March, 1980 but subsequently withdrew it, contending (a) that the Department lacked legal authority to require state compliance programs under Title IX or Section 504, and (b) that the Department's interpretation of the scope of these statutes with respect to employment practices was wrong.[88] After approval of the state's three-year plan for administration of grant funds under the Vocational Education Act was withheld because it had not filed its MOA, New Mexico submitted a new MOA which covered only Title VI in some areas but extended to Title IX and Section 504 in others.[89] After minor modifications were made at the suggestion of the regional office, the MOA

> Title VI. Including Title IX and Section 504 in your MOA submission will simplify and smooth the approvability process.
>
> Moreover, since submission of a supplemental MOA covering Title IX and Section 504 will be required upon publication of a final rule, we believe that it is in your best interest to submit a comprehensive document covering requirements under all three statutes at this time in order to avoid this additional exercise later.

[88] See supra note 73 and accompanying text.

[89] For example, the MOA indicated that the state would review its vocational education policies only under Title VI. However, the document went on to suggest that in several policy areas, including funds distribution, criteria for grants or contracts, procedures for setting geographic boundaries for vocational institutions, the location of sites, and policies for cooperative and work-study programs, the state would seek to assure nondiscrimination on the basis of sex and handicap, as well as race. Similarly, the MOA indicated that the state would, in its on-site reviews, apply compliance standards under Title VI and also, "where appropriate," Title IX and Section 504.

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was approved on December 4, by OCR Assistant Secretary for Civil Rights Cynthia Brown, even though New Mexico was the only state which refused to cover Title IX and Section 504 fully in its MOA.

Thus, the failure to amend the Title IX and Section 504 regulations led directly to New Mexico's incomplete MOA being approved, and it also raised questions about enforcement of Section II of the Guidelines with respect to Title IX and Section 504. Despite the awareness of the Department about these problems, in five years' time the regulations have never been amended nor have the Guidelines been changed. In November, 1982 Assistant Secretary for Civil Rights Harry Singleton sent Secretary of Education Bell a memorandum and proposed NPRM (Notice of Proposed Rulemaking) to accomplish the regulatory change. It is still in the Departmental clearance process and has never been published.[90]

Although no explanation has ever been given for the Department's failure to make the regulatory change, the inconsistency between the wording of the Title VI, Title IX and Section 504 regulations has led OCR to adopt an extreme and ill-founded interpretation of its authority. In responding on September 23, 1983 to a draft Civil Rights Commission report, Mr. Singleton said:

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[90] See the recent exchange of correspondence with Secretary Bell attached as Appendix D. Despite Secretary Bell's letter, the matter is not contained in the Department's 1984 Unified Agenda of Regulations. See 49 Fed. Reg. 15802-12 (April 19, 1984).

> . . . OCR does not have regulatory authority under Title IX and Section 504 to require States to adopt Methods of Administration. A regulation has been proposed to extend the Methods of Administration requirement under Title VI to Title IX and Section 504. In the meantime, OCR will continue review of State Methods of Administration under Title VI and voluntary plans implemented by State agencies under Title IX and Section 504. Compliance reviews will be scheduled under Title VI when significant deficiencies are found in the annual audits.[91]

This statement is very clearly wrong insofar as it concerns OCR's authority to undertake compliance reviews and enforcement action if a State, in carrying out "voluntary" MOA activities, obtains information about violations of Title IX or Section 504 by subrecipients but fails to do anything about the violations.

Assuming arguendo that OCR cannot require advance submission and approval of a detailed state agency enforcement plan for sex and handicap discrimination by subrecipients until the respective regulations are amended to parallel the Title VI regulations, nevertheless state authorities have clear statutory obligations under Title IX and Section 504 to prohibit discrimination by subrecipients. Even in the absence of the Guidelines and the MOP, OCR has ample authority to proceed against a state which knowingly continues to provide federal funds to a subrecipient practicing discrimination on the basis of sex or handicap.[92] Hence a state agency which identifies practices by local school districts or vocational institutions that are discriminatory on the basis of sex or handicap but requires no corrective action, and continues to provide Federal financial assistance to the district or institution, is subject to enforcement action by OCR.[93] Indeed, we believe that state obligations under Title IX and Section 504 are so clear that OCR has authority to enforce the MOA provisions of the Guidelines even under the regulations as they now stand.[94] However, the easiest course of action is simply to amend them, as several OCR Directors have recognized. That this has not yet been done calls into question the professed commitment of OCR and the Department to an effective state role in civil rights enforcement.

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[91] Letter dated September 23, 1983 from Harry Singleton to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, p. 3, reprinted in Appendix B to U.S. Commission on Civil Rights, Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance (November 1983).

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[92] See 34 C.F.R. §§ 104.3(f)["recipient," for purposes of § 504, includes transferee of federal funds from another recipient, but not ultimate beneficiary of assistance], 104.4[recipient may not discriminate, directly or "through contractual, licensing, or other arrangements," on basis of handicap, 106.2(h)["recipient," under Title IX, includes transferee of federal financial assistance through another recipient], 106.4(a)[applications for assistance must include assurance from "applicant or recipient" of compliance with Title IX] (1983).

[93] Recently OCR Director Harry Singleton reiterated his view that the regulations must be amended in order for the agency to enforce an MOA requirement under Title IX and Section 504. At the same time, Mr. Singleton denied that OCR "ever has suggested that States should 'ignore' violations of Title IX or Section 504 that come to light during desk audits or on-site reviews of subrecipients undertaken under Title VI." (See correspondence attached as Appendix E.) However, so long as Mr. Singleton instructs OCR regional offices to examine annual state MOA reports only under Title VI, see infra p. 101, that implication seems unavoidable.

[94] See supra note 92.

Coverage under Title IX and Section 504 was not the only problem with New Mexico, however. In the spring of 1982, the Dallas Regional Office of OCR finally got around to reading the MOA reports which that state sent to the federal government in January and July, 1981.[95] Although there had been indications in its MOA that New Mexico's secondary school vocational curricula would be examined,[96] the reports indicated that only post-secondary institutions were subject to desk audit or on-site reviews. The OCR regional office contacted several state officials to determine why secondary schools were being omitted, in accordance with recommendations made by John Scheldrup in the headquarters office. The state's position was that since all of New Mexico's federal Vocational Education Act funds went to post-secondary institutions affiliated with colleges or universities, secondary schools and local districts were not "subrecipients" under the Guidelines or MOP.

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[95] The Department's oversight of state MOA programs is discussed in Chapter 6, *infra*, at pp. 79-107.

[96] The MOA did not identify the universe of New Mexico subrecipients subject to the Guidelines. It did, however, contain appendices which the state provided "to give a historical perspective and the current procedures which the New Mexico State Department of Education Vocational-Technical Unit believe are significant in assuring the Secretary of Education New Mexico's continued pursuit to ensure equal access to vocational education programs." The first attachment described New Mexico's commitment to "equal access to vocational education," referring to exploratory courses such as industrial arts and home economics which had traditionally been selected only by students of one sex. It also referred to evaluation forms "included in the appendix of the Five-Year Plan [under the federal Vocational Education Act] 1978-1982 [which identified] 17 questions on the secondary form . . . which relate to services provided which prevent stereotyping or discrimination based on race, sex, or handicap." The second attachment also included numerous references to secondary and exploratory courses.

The Vocational Education Guidelines, however, are very clear on this issue. Section I.A., entitled "Application of Guidelines," states:

> These Guidelines apply to recipients of *any* Federal financial assistance from the Department of Education that offer or administer programs of vocational education or training. This includes State agency recipients.[97]

Scheldrup accordingly instructed the region to determine whether, and if so, how many, public secondary schools offered vocational education; and whether, and how many, of those schools received any type of Federal financial assistance from the U.S. Department of Education; and, finally, whether the New Mexico State Department of Education had supervisory, approval or oversight responsibilities relating to secondary schools receiving such Federal financial assistance and offering vocational education. He told regional office personnel "that if the public secondary schools offer voc-ed programs and are receiving Federal financial assistance, the respective SDE unit has compliance monitoring responsibilities."[98]

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[97] 34 C.F.R. Part 100, Appendix B, at p. 324 (1983); 44 Fed. Reg. at 17164 (March 29, 1979)(emphasis added).

[98] Memorandum from Juan Ibarra, Branch Chief, to John A. Bell, Division Director, Elementary and Secondary Education Division, OCR Region VI, May 5, 1982, at 2.

Regional office personnel gathered the appropriate information, concluding by the end of May, 1982 that

> All 89 of the New Mexico Public Secondary Schools (and some Jr. Highs) offer a vocational education program . . . [and] All 89 New Mexico Public Elementary/Secondary schools receive Federal financial assistance under Title IV-B . . . [and] with the exception of the Los Alamos Public Schools (P.S.), Animas P.S. and San Juan P.S., the remaining 86 New Mexico Public Schools receive Federal financial assistance under Title I.

Further, "although the SDE [New Mexico State Department of Education] has only administrative and programmatic responsibilities in the processing of the application, its approval clears the recipient for funding purposes. The SDE is, therefore, involved in the funding process."[99] Pursuant to the guidance previously offered by OCR headquarters, regional office staff recommended that the state's interpretation be rejected and that remedial action be required.[100]

OCR has never instituted any compliance action against New Mexico; apparently Scheldrup's opinions, whether regarded as "training," "technical assistance" or "guidance," are not authoritative. On November 15, 1982, OCR's Dallas Office Regional Director wrote to the New Mexico Superintendent of Public Instruction summarizing the results of the office's review of the 1981 and 1982 Annual Reports on implementation of the state's MOA:

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[99] Memorandum from Juan Ibarra, Branch Chief, to John A. Bell, Division Director, Elementary and Secondary Education Division, OCR Region VI, May 27, 1982, at 2, 3.

[100] _Id._ at 4.

> . . . The basis for the State agency's position is that although its secondary schools are recipients of Federal financial assistance, and do offer vocational education programs they are not direct recipients of vocational education grants, as set forth in Section II-B of the Vocational Education Guidelines.[101] Therefore, the State agency takes the view that it does not have a legal obligation for oversight of compliance with Federal civil rights laws by subrecipients at the secondary level.[102]

Even though this interpretation was rejected by OCR, no compliance action was taken; instead, the matter was referred to Washington:

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[101] Section II.B of the Guidelines does not define "subrecipients" based upon receipt of Vocational Education Act funds; it is, rather, completely consistent with Section I.A. of the Guidelines, quoted above, *see supra*, text at n.97. Section II.B begins:

> The State agency responsible for the administration of vocational education programs must adopt a compliance program to prevent, identify and remedy discrimination on the basis of race, color, national origin, sex or handicap by its subrecipients. (*A "subrecipient," in this context, is a local agency or vocational education center that receives financial assistance through a State agency* . . . .

34 C.F.R. Part 100, Appendix B, at p. 325 (1983); 44 Fed. Reg. at 17165 (March 21, 1979). The only reference specifically to Vocational Education Act funds is contained in Section III.A. of the Guidelines, which provides:

> Recipients that administer grants for vocational education must distribute Federal, State, or local vocational education funds so that no student or group of students is unlawfully denied an equal opportunity to benefit from vocational education on the basis of race, color, national origin, sex, or handicap.

34 C.F.R. at p. 326; 44 Fed. Reg. at 17165.

[102] Letter from Taylor D. August, Regional Director, OCR Region VI, to Hon. Leonard J. Delayo, New Mexico Superintendent of Public Instruction, November 15, 1982, at 2.

> Inasmuch as we have not been able to resolve this matter at the Regional level, it is with regret that we must refer this matter to our Headquarters' Office for further guidance.[103]

Nearly one and one-half years later, and after much prodding,[104] OCR headquarters finally adopted Scheldrup's earlier position, though final resolution with New Mexico still has not been achieved.[105] On December 2, 1983, we wrote Mr. Singleton, pointing out that

> As of September 1, 1982, OCR Region VI had not reviewed vocational programs in New Mexico at the secondary level in any school system. As of the present, the New Mexico State Department of Education has never reviewed the conduct of vocational programs in New Mexico at the secondary level. For all that any governmental official knows, then, there may well be outstanding violations of the relevant statutes or of the Vocational Education Guidelines that are going undiscovered or unremedied. I hope that you will not permit this situation to continue. OCR should insist that the New Mexico Department of Education begin immediately to include review of secondary vocational programs in its MOA activities.

Ultimately Singleton responded on February 2, 1984 agreeing that "public secondary schools offering vocational education programs in New Mexico are . . . 'subrecipients' within the meaning of . . . the Guidelines." (See correspondence attached as Appendix F.)

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[103] Id.

[104] On July 5, 1983 the Federal Education Project wrote OCR Director Harry Singleton inquiring about the status of the regional office referral. On August 31, he replied that "[t]he headquarters policy staff is considering this matter. As soon as a determination has been made as to how this office will proceed, you will be so informed."

[105] See Appendix F. By now, the question of which activities of which educational agencies and institutions in New Mexico are subject to the MOA must be reassessed in light of the Supreme Court's decision in Grove City College v. Bell, 52 U.S.L.W. 4283 (U.S. Feb. 28, 1984).

The conclusions to be drawn from the New Mexico experience are very clear: OCR has never provided adequate training to regional office staff about the requirements of the Guidelines and the Memorandum of Procedures which would allow them to carry out their responsibilities effectively. In addition, and contrary to the suggestions made to us by OCR supervisory officials in Washington, there is neither an effective mechanism for answering questions from the regions nor a capacity on the part of the agency to analyze and resolve policy disputes in a timely fashion.

These inadequacies have caused the various regional offices to take inconsistent positions when they do act. The lack of structure and authority in headquarters has also communicated to the regional offices -- as surely as if it were done explicitly -- the sense that they should not initiate any strong compliance or enforcement action over MOA inadequacies. (This latter impression is reinforced by a number of other OCR operating procedures. For example, there is no regular review of regional office performance in conducting compliance reviews or complaint investigations of schools offering vocational training, nor of the regional offices' superintendence of state MOA programs.[106] Additionally, as the November, 1982 referral by Region VI suggests, and as we were told by both headquarters and regional office staff, any potential compliance or enforcement letter connected with the MOAs must receive prior approval from Washington.[107]

Because OCR has never assigned to anyone in the headquarters office the primary function of overseeing MOA implementation, and because the agency for so long was unable to make the simplest of policy determinations by telling New Mexico that OCR it would adhere to the plain English-language meaning of the 1979 Guidelines, headquarters is apparently unaware that the question whether the universe of subrecipients is properly limited to VEA grantees has arisen in many states; and also that different regional offices have taken inconsistent positions on the matter. For example, in the fall of 1982 OCR Region IV wrote to South Carolina that "[t]he determining factor under the MOA agreement is whether or not Federal vocational education funds are given to the Denmark Technical College."[108] (Since they were not, the region advised, the school need not be reviewed under the state's MOA even though it unquestionably received Federal financial assistance, from the U.S. Department of Education and administered by a state agency.) On the other hand, OCR Region V successfully pressed Wisconsin to change its definition of the subrecipient pool, which had previously been limited to VEA fund recipients.[109] And OCR's Region X took no action upon learning that Oregon's "internal policy is not to review districts that have no voc ed funds . . . ."[110]

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[106] A quality control program does exist in other substantive areas but none has ever been implemented for vocational education. Cynthia Brown confirmed that this was the case during the time that she served with OCR in both HEW and the Department of Education. Current regional office and headquarters office staff to whom we spoke were unaware of any change. Ms. Brown told us that she believed many of the regional offices cared about equity in vocational education and the adequacy of the MOA process but they did not get enough guidance from headquarters and exercised too much discretion in carrying out their responsibilities. This situation is probably due in large measure to the general lack of familiarity with the issues on the part of headquarters staff and to the paucity of policy development which OCR has undertaken in this area. After we began our study and had made several FOIA requests for information, OCR Director Harry M. Singleton decided that the 1983 annual reports from the states about their MOA implementation, together with the comments and analyses of the regions, should be reviewed in Washington. See 48 Fed. Reg. 57588, 57589 (December 30, 1983)[preface to final FY 1984 OCR Annual Operating Plan]. This step had never before been undertaken.

[107] Approval can be a long time in coming. To our knowledge, OCR has never advised a state in writing that remedial action is required in order to avoid formal enforcement steps connected with its MOA performance.

In summary, an adequate effort by OCR to provide the information, training and guidance to its regional offices which would support effective oversight of the state MOA process and which would provide the basis for regional office compliance activities carrying out the 1979 Guidelines[111] has been totally lacking. OCR has been unaware, and has not wished to know, what the regions were doing.[112] It has never issued an investigative manual or other policy document for its staff in final form,[113] and it keeps no ongoing collection of such policy determinations in the vocational education area as are made.[114] It has offered organized training to its far-flung regional staff only once in five years. Yet, as we will see, and as was true with respect to the initial approval of the MOAs, OCR has placed the entire responsibility for this effort in the regions.[115]

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[108] Letter from Lamar Clements, Director, Elementary and Secondary Education Division, to G. William Dudley, Jr., Executive Director, South Carolina Board for Technical and Comprehensive Education, November 15, 1982, at 2.

[109] _See_ letter from Kenneth A. Mines, Regional Director, to Hon. Herbert G. Grover, Wisconsin Superintendent of Public Instruction, November 15, 1982, at 5-6.

[110] Memorandum of telephone conversation between Eleanor Hill, OCR Vocational Education Coordinator, and Larry Matthews, Vocational Evaluator, Oregon State Department of Education, October 27, 1981 (obtained through FOIA request).

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[111] We discuss OCR's own compliance activities in vocational education in Chapter 8, infra at pp. 121-139.

[112] The only exception to this statement prior to late 1983, see supra note 106, was a superficial questionnaire to the regions that produced no useful information. It is described infra at pp. 89-93.

[113] See supra note 62.

[114] Interview with Thomas E. Esterly, Director Program Review and Assistance Service, OCR.

[115] It is little wonder, under these circumstances, that a number of state education departments' employees told us they were dissatisfied with the support and assistance they were receiving from OCR regional offices.

Chapter 6. Federal Oversight of MOA Implementation

SUMMARY: To date, the federal government's monitoring and supervision of the vocational education MOA process has been poorly planned, chaotically implemented, and largely ineffectual.

Although the Department of Education originally planned to involve the Office of Vocational and Adult Education (OVAE), as well as OCR, in the monitoring and evaluation of state efforts, this scheme was abandoned shortly after the first annual state MOA reports were received. Instead, OCR decided to have its regional offices carry out these duties, even though no staff time or resources had been allocated to the function in the agency's annual operating plans and even though regional office personnel still had not received any training about the Guidelines or MOP.

In September, 1981 the OCR regional offices received notice of their new responsibilities and of a training conference to be conducted in Denver the following week; this was the only training of OCR staff about the Guidelines and MOAs in the five years from 1979 to 1984.

Significant MOA activity did not occur in the regional offices until mid-1982, and even then, OCR headquarters provided little guidance or assistance. Decisions about whether to conduct on-site visits to states whose reports raised questions about the adequacy of MOA implementation, about the means for notifying the states of regional office conclusions, about how deeply to probe into the *substantive quality* of state activities, and about the sort of enforcement action to take, were all left to the discretion of the regional offices, without review by or direction from headquarters.

The pattern of regional office activity, accordingly, varied considerably. Most regions "suggested" changes in state programs but took no formal enforcement actions even when there was no improvement.

In the fall of 1982, after we began this study, OCR Assistant Secretary Singleton sought to evaluate the status of MOA implementation in each state by having the regional offices complete a questionnaire. The design of the instrument was inadequate, OCR waited for six months before analyzing the responses, and the headquarters staff ignored the few serious comments about deficiencies in the program that were made by regional directors. Instead, they prepared a memorandum to Singleton which asserted that most states were doing a good job and which provided two- or three-sentence capsule characterizations of each state's progress. After Singleton received another memorandum from one headquarters employee questioning whether the data were adequate to support this optimistic portrayal, Singleton had the questionnaire responses updated by a series of telephone calls to the regional offices (which still did not address the quality of state efforts) and announced that a task force would be convened to recommend improvements in OCR's handling of the MOAs.

Little beneficial change has taken place, however. Although in September of 1983, for the first time, written instructions for reviewing the state MOA reports were sent to the regional offices, they largely reiterated the language of the Guidelines and MOP and did not focus on the substance of state activity.

There remains no sense of OCR priority attached to the MOA process, either in the regions or at headquarters, as indicated by the continuing failure to appoint a high-ranking official to supervise the agency's efforts and provide guidance to the regional offices. The 1984 Annual Operating Plan still assigns no specific resources or staff time to this subject, and since many of OCR's other activities (such as complaint investigations and compliance reviews) are subject to court-ordered time limits, the MOAs inevitably receive little attention.

Moreover, the September, 1983 instructions to the regions direct review of state MOA activities only with respect to Title VI, thus substantially weakening federal oversight and enforcement. They also withdraw authorization for the regional offices to take any enforcement steps when they conclude there are deficiencies in state MOA activities, unless prior clearance from headquarters is secured; and OCR has further attenuated the effectiveness of its role by delaying for many months the release of regional office letters to the states summarizing the findings of the analysis of 1983 reports.

Finally, the regional offices have decided (and headquarters has agreed) that no compliance reviews of institutions or school districts covered by a state MOA on-site visit should be conducted -- even though this would provide an excellent opportunity to evaluate the substantive adequacy of a state's MOA procedures.

> As a result of these policy decisions and management failures by the federal agency, there has been little or no incentive for states to meet the Guidelines and MOP requirements. The California State Department of Education, for example, had failed in four years to conduct a single desk audit or on-site review of a subrecipient but had never received a final Letter of Findings from the regional OCR office nor had there been any enforcement actions taken against it.
>
> This dismal picture complements OCR's current de-emphasis of enforcement in favor of what it calls "technical assistance."

We have seen that after the MOAs were submitted to the Department, OCR played the major role in evaluating their suitability and obtaining any appropriate changes prior to acceptance and approval. The same pattern developed with respect to continuing federal oversight of their implementation by the states.[116]

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[116] The compliance program required by Section II of the Guidelines may be analyzed in two different contexts. First, it is an elaboration of the responsibilities imposed upon state recipients of federal funds by the statutes (Title VI, Title IX, and Section 504) themselves, an obligation analogous to the duty not to discriminate imposed upon all recipients. As the district court and Court of Appeals in the Adams case have recognized, the federal government is required to ensure that these obligations are carried out. Hence, OCR is not free to ignore the adequacy or quality of a state's MOA performance. Second, it has been suggested that while the MOA program is not a complete substitute for OCR enforcement of federal antidiscrimination statutes in vocational education, it may serve as a model for the successful delegation of major portions of federal responsibility to state agencies. The

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The Memorandum of Understanding between OCR and BOAE which was signed in 1980[117] provided that

> OVAE will monitor state implementation of the MOAs through the Management Evaluation Review for Compliance/Quality (MERC/Q) and report review results to OCR. Technical assistance requested by states to implement the MOAs will be provided by OVAE's Division of Vocational and Technical Education.

This contemplated scheme was never effectuated. In the spring

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critical element of this model, however, is its recognition that there _is_ a federal responsibility. If it is to be delegated, it must only be delegated subject to assurance that the responsibility will be effectively carried out. Thus, under this model as well, OCR retains the obligation to monitor the states' MOA performance. Default on that obligation renders the whole exercise meaningless.

Under the first analysis, if the Department concludes that a state is failing to meet the requirements of Title VI, Title IX or Section 504 with respect to assuring nondiscrimination by subrecipients, it must initiate enforcement activity (which may include negotiation of a voluntary compliance remedy). Under the second model, the Department must provide the necessary support, guidance or technical assistance to ensure that inadequate programs are corrected and operated properly in the future. (If this cannot be accomplished the Department must reassume responsibility for vocational education civil rights compliance in the affected states.) The MOA process obviously shares the characteristics of both models, and the label applied to it is relatively unimportant. Two matters are crucial under either analysis. First, there must be an appropriate oversight of state MOA implementation by the Department which includes the gathering of sufficient information to permit informed evaluation. Second, where implementation is inadequate, the Department may not delay unreasonably in commencing enforcement action directly against the state involved or otherwise resuming responsibility for voc ed civil rights enforcement in vocational education in that state.

For these reasons, we focus in this chapter upon the procedures established by the Department for monitoring MOA implementation and how they have been carried out.

[117] _See supra_ p. 35 & n.46.

of 1981, OVAE sent OCR a proposed checklist for use in the MERC/Q evaluations, which was "extracted verbatim from the Memorandum of Procedures . . . ."[118] Instead of approving or revising the document, OCR decided to assume responsibility itself for evaluating state performance under the MOAs.[119] Thus, the idea of substantially involving the "program" side of the Department in civil rights was jettisoned.[120] While it is not clear whether, and to what extent, OVAE might have been in a position to implement an MOA component in its MERC/Q reviews in 1981, OCR did not act promptly to fill the gap in oversight created by its alteration of the 1980 MOU. It was not until September 15, 1981 that OCR's Regional Directors were formally notified that the shift had taken place, that the responsibility for monitoring state performance under the MOAs was to be placed upon the regional offices,[121] and that training for regional office staff would be conducted in Denver the following week.[122] The regional offices were advised that

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[118] Decision Memorandum from Maurice C. Clifford, Acting Deputy Assistant Secretary, Office of Program Review and Assistance, OCR to Frederick T. Cioffi, Acting Assistant Secretary for Civil Rights, May, 1981 (executed by Mr. Cioffi on June 29, 1981), at 2.

[119] Id. at 6.

[120] In fact, the move to assume responsibility for monitoring the MOAs ultimately proved necessary. Although OVAE retains the nominal responsibility for receiving and reviewing the annual state MOA reports before passing them on to OCR for further study, the Department has imposed major personnel cuts on OVAE; as a consequence, MOA activities within that office have an even lower priority than they formerly did. (Interview with Dr. Lee Cornelsen, OVAE.) Recently OVAE was reorganized again after a series of RIFs which included the staff personnel who formerly had responsibility for MOA activities. In response to inquiries from the Federal Education Project, Education Secretary Bell was able to provide only the most general assurance that OVAE would continue to be involved in any way with the MOA process.

> The principal document available to assist the regional office in evaluating each State's adherence to its MOA is the Annual Civil Rights Compliance Report.[123]

No specific time frames for monitoring state MOA performance were established; indeed, the September 15 Memorandum to Regional Directors described what the regional offices were expected to assess "[d]uring the next two years . . . ."[124] It is therefore not surprising that there was little activity in most of the regions until the spring of 1982 at the earliest, and not until the fall of that year in some cases.[125]

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[121] Memorandum to Regional Directors, OCR, from Antonio J. Califa, Director of Litigation, Enforcement and Policy Service, OCR, September 15, 1981.

[122] The Denver training session is described in Chapter 5, supra pp. 61-62.

[123] September 15, 1981 Memorandum to Regional Directors, supra note 121.

[124] Id. at 2.

[125] The same sense of passivity surrounded questions of appropriate monitoring and investigative technique. In March of 1982, for example, John Scheldrup in OCR headquarters advised that each region should decide for itself whether to conduct an on-site visit to evaluate MOA progress, and that regional offices similarly had discretion in formulating what advice or letters they would provide to the states to summarize their conclusions. (Record of March 15, 1982 telephone conversation between John Scheldrup and Felix Sandoval, OCR Region X, produced in response to Freedom of Information Act request.) For personnel of an agency subject to court-imposed deadlines

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After the decision to reallocate to OCR the responsibility for monitoring state MOA performance, OVAE's role has been an extremely limited one. In 1982 OVAE staff did read through the initial series of reports submitted by the states to the Department[126] and prepared summaries and recommendations for each. Although these state-by-state summaries did not cover many substantive issues, they did identify the ways in which the reports fell short of the standards in the MOP, primarily by listing the respects in which reports omitted information necessary to facilitate a substantive review. (For example, OVAE noted that: 16 states did not list subrecipients which had been the subject of agency-level reviews; many reports did not include copies or summaries of Letters of Findings from on-site reviews and/or remedial plans adopted by subrecipients; and only 15 states identified the subrecipients who had requested technical assistance.)

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and specifics in other areas of its work (see supra note 17 and accompanying text), the message was clear: MOA performance review had no high priority and headquarters was not interested in having the regional offices push the states very hard.

[126] The first reports of MOA activity were, in theory, due to be filed in July 1, 1980. However, due to the delay in approving state MOAs, the date for the first report was extended to January, 1981. OCR recognized that "the 1980 Annual Reports will often contain sparse or incomplete information because at the time of their submission most MOAs had not been evaluated and approved; and, consequently, there would be little activity to report." (Memorandum to Regional Directors, OCR, from Antonio J. Califa, Director for Litigation, Enforcement and Policy Service, September 15, 1981, at 1.) Hence, the first meaningful reports to be analyzed were those for FY 1981, due to be submitted in July of that year, and regional offices were directed to focus their attention upon these reports.

OVAE originally intended to send its brief summary of the annual report to each state together with modest suggestions for improvement. However, after the realignment of responsibility, the documents were instead forwarded to the OCR regional offices "in order to avoid confusing the states with possibly conflicting recommendations from two separate offices in the U.S. Department of Education."[127] Unfortunately, we could find no evidence that OVAE's evaluations were ever passed on to the states.[128] The Department simply let slip an early opportunity to use the combined resources of OCR and OVAE to provide analysis and guidance to states in the implementation stage.

OCR's regional offices did not work any more efficiently. There was no significant activity in any of the regional offices until the spring and summer of 1982 to examine how states were actually carrying out their MOAs. A few on-site visits to state agencies responsible for MOA activities were conducted at this time, although most regions did not undertake this step until the fall of 1982 or thereafter. As suggested above, the regional offices were left on their own by OCR headquarters about how to handle the results of their investigations, and how hard to press states with MOA inadequacies.

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[127] Transmittal letters to Regional Directors, OCR, from LeRoy Cornelson, OVAE, May 27, 1982.

[128] The documents we obtained from the OCR regional offices do not indicate that any of the OVAE summaries were sent to the states, and no state staff to whom we spoke could recall receiving one.

Not surprisingly, there has been considerable variation in the performance of the regional offices. Most reacted to the states' annual reports by noting deficiencies in the reports' contents rather than by attempting to evaluate the substance of the state investigations. In effect, OCR's review of the annual reports all too often concentrated on how future reports could be made facially adequate, rather than on the substance of the MOA process.[129]

Many of the early annual reports did not transmit copies of the letters of findings resulting from the on-site reviews which were conducted or include appropriately detailed summaries thereof in the body of the reports), nor copies of remedial plans submitted by subrecipients.[130] Although these documents are essential to an adequate evaluation of states' civil rights enforcement under their MOAs, not all of the regional offices asked for them; instead, some merely indicated that this information should be included in future annual reports. For example, in the summer of 1982 one OCR regional office told a state that there were "fundamental deficiencies" in its MOA performance, including the failure to issue letters of findings and/or obtain remediation commitments from subrecipients. OCR did not ask that these phases of the prior years' MOA activities be completed and documentation provided to the regional office. Once the state responded in writing by promising that in the future "[l]etters of findings and notification letters will be used and issued as defined in a pending MOA revision" and "[c]onsistent with the findings corrective action and plans will be sought and documented by subrecipients," the regional office "closed" its compliance review. However, the 1983 Annual Report for this state does not show substantial improvement. Copies of letters of findings are still not included with the report, nor are remediation plans, and the fragmentary summaries of findings from on-site reviews do not permit an adequate assessment of the current effectiveness of the state's MOA program. In another instance, a regional office was informed in the fall of 1981 that a state agency was going to drop a school district from the list of subrecipients scheduled for on-site reviews because the "State's internal policy is not to review districts that have no [federal] voc ed [Act] funds, . . ."[131] but OCR did nothing.

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[129] For example, one regional office asked a state for a more complete listing of all personnel engaged in MOA work; another asked for the dates on which subrecipients were notified prior to on-site visits; another advised a state to delineate which technical assistance visits resulted from subrecipient requests and which were self-initiated.

[130] The Guidelines and MOP require the states to prepare written letters notifying subrecipients with specificity of any civil rights violations found in on-site reviews, and also to secure written plans from subrecipients which detail adequate steps that will be taken to remedy the violations. The sorts of problems with which the states deal in the MOA process are outlined in Chapter 9, infra, pp. 140-174.

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[131] For other examples of failure to correct this misinterpretation of the Guidelines by regional offices, see supra pp. 70-77.

There was still virtually no attention being paid at OCR headquarters to the quality of MOA implementation. The same attitude that left it entirely to regional office staff discretion whether to conduct on-site reviews of state MOA performance kept anyone in headquarters from spending the time and effort required to read both the primary state-generated documents (the annual reports, letters of findings from on-site reviews of subrecipients, etc.) and also the regional office evaluations (which the regions were not even required to send to Washington). As a consequence there was almost no information in Washington about what the states were doing, and there was most certainly no effort to assure that the regional offices acted consistently to prod the states toward adequate enforcement.

In the fall of 1982, after we began this study and had met with a number of OCR headquarters officials seeking information about MOA implementation, Assistant Secretary Harry M. Singleton asked the regional offices to complete questionnaires about MOA status in the states. This effort to evaluate the MOAs replicated the procedural, statistical emphasis which had characterized much of the activity in the regional offices. For each state, the regional office was to identify the unit of state government charged with MOA responsibility, provide a variety of quantitative information for the 1981 and 1982 fiscal years,[132] and then give a brief narrative evaluation.[133] All of the regions completed the questionnaire and returned them to headquarters in December, 1982. The narrative comments upon state performance were generally terse and superficial, describing the states as "committed" but usually providing little supportive detail. Most regions attributed deficiencies in state performance to "turnover" of personnel, budget difficulties, hiring freezes, etc.

One or two regional offices recognized that there were serious problems in some of the states that could not easily be summarized in a statistical calculus, and also that far more attention from OCR was required to bring about effective change.[134] The message did not readily become apparent in

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[132] For each state, the regional office was to supply the number of full-time and part-time personnel assigned to MOA work, the number of subrecipients (by type of institution or agency), and for each fiscal year the number of agency-level and on-site reviews conducted, letters of findings issued, number of violations of Title VI, Title IX or Section 504 found (to be further characterized as either "substantive" or "procedural"), the number of subrecipients to whom technical assistance about the Guidelines requirements was provided by the state, the number referred to the regional office for technical assistance, and the number of subrecipients referrd to the regional office because the state agency had been unable to secure an acceptable voluntary compliance plan after finding a probable violation in an agency-level or on-site review.

[133] Memorandum from Assistant Secretary Harry M. Singleton to Regional Directors, OCR, November 16, 1982. The information requested was to be furnished to headquarters by December 15, 1982.

[134] For example, one Regional Director referred to a memorandum sent to Assistant Secretary Singleton at the end of September, 1982, which stated:

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Washington, however. First of all, despite the short turn-

> Consistently our reviews found the states (1) excelling in technical assistance to subrecipients and in their review of state policies and practices;(2) somewhat deficient in preparation of annual reports; and (3) seriously deficient in the most important MOA area: desk audit and on-site review compliance. . . .
>
> We, of course, required corrections on these essential matters. To be appropriately fair to these state agencies, in every instance state officials were receptive to making these remedial actions and welcomed OCR guidance. We believe there is a fundamental reason for this receptivity, a reason which became clear in our first two reviews of state agencies: desk audits and on-site compliance was virtually a new field for state staff. Regardless of any warranted expectations that state staff were prepared for compliance assignments, they were not.

Another Regional Director wrote to Singleton that

> 1. The development of good computer programs for use in desk audits should be encouraged. This is especially important for states that have large numbers of subrecipients to review. A prototype computer program developed by OCR, or one identified from a state with a particularly good compliance program that could be adapted for use by the individual states, should be made available to states that can use it.
>
> 2. There is a need for additional training in investigatory/review procedures to be made available to state personnel administering the compliance program(s). The training provided by the American Coalition of Citizens with Disabilities, Inc. under contract with the Department was particularly good. However, we have found that most states do not have personnel dedicated to their vocational education compliance responsibilities on a full time basis. To fulfill their responsibilities, most state vocational education compliance officers "borrow" personnel from other state program components on an "as needed" basis. These persons very often do not have either the experience or training to examine subrecipients to determine their civil rights compliance. It would be of assistance to the states

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around time given the regional offices to produce the data, they were not even analyzed until early April, 1983. A summary prepared at that time[135] reported that "[f]rom the national perspective, the States are close to meeting their responsibilities"[136] and that "[r]egional office evaluations of State commitments to the State agency compliance program are generally positive."[137] Second, the summary reflected the statistical overgeneralization typical of the questionnaire approach.[138] Third, the questionnaire methodology was defective and precluded

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> if OCR could provide training to these ad hoc groups on techniques used in reviewing subrecipients.
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> 3. There is a need for a mechanism which provides to State personnel on an on-going basis, OCR policy and civil rights case law updates.
>
> Most state compliance programs either do not have available to them or do not use legal counsel. They do not, therefore, keep abreast of court decisions as they relate to the administration of their compliance programs. A policy newsletter or digest distributed by an OCR Headquarters clearinghouse would serve this purpose. . . . It would be of assistance if our positions and court decisions on these matters and others were made available to state personnel on a regular basis.

[135] Memorandum from Frederick T. Cioffi, Director, Elementary and Secondary Education Division to Antonio J. Califa, Director for Litigation, Enforcement and Policy Service, OCR, April 4, 1983.

[136] Id. at 1.

[137] Id. at 2. The memorandum did recognize that "regional office staff recommend an increased OCR effort to provide training and technical assistance to State agency staff." Id.

[138] For instance, the summary reported that the number of desk or agency-level reviews conducted across all the states and

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an intelligible assessment of the quality of state MOA efforts.[139] Finally, the summary prepared for use by OCR policymakers in headquarters simply boiled down even further the series of oversimplifications and generalizations about each of the states and territories which typified most of the ques-

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territories subject to the MOA requirements in FY 1981 and 1982 showed "an acceptable rate for this early stage of the program's implementation" even though "[f]ive States and territories have done no desk audits at all" and another five had completed less than half the number expected. Id. at 5, 6. In similar fashion, the summary concentrated on whether states had performed the minimum number of on-site reviews (i.e., 25% of all subrecipients subjected to a desk audit) rather than seeking to evaluate the quality of the on-site visitations or to determine whether all subrecipients for which the desk audit indicated potential compliance problems were scheduled for on-site consideration. Id. at 6. (In FY 1981 and 1982, the summary indicates, nine jurisdictions did less than half the minimum number of on-site reviews!)

[139] The summary prepared at OCR headquarters attempted to provide definitions for "procedural" and "substantive" violations found by state agencies (see supra note 132), but those definitions did not appear in the original memorandum requesting the information from the regions (supra note 133); the author of the summarization was forced to admit that

> The reporting on this item is the least reliable of all. Apparently, the regional staff had difficulty in sorting out substantive and procedural violations in the State annual reports and in copies of state agency LOFs [Letters of Findings].

In an incomprehensible burst of optimism or faith, the author of the summary memorandum opined that "[d]espite these defects, it is apparent that the number of substantive violations found through on-site reviews is not critically less than the number of procedural violations." It could be said with equal or greater assurance that both figures were lower than the number of angels which might comfortably dance on the head of a pin!

The summarization also concluded that confusing terminology eliminated the possibility of reaching any meaningful conclusion about the kinds of technical assistance the states were providing (April 4, 1983 memorandum, supra note 135, at 8).

tionnaire responses.[140] These two-or three-sentence capsule summaries were then sent forward within OCR as the primary source material for making the managerial and policy judgments about the effectiveness or need for strengthening of the MOA program. (It should be recalled here that none of the written products resulting from regional office MOA oversight are regularly transmitted to headquarters, and that the "quality control" unit in headquarters has never selected a region's oversight process for review and evaluation.)

Perhaps predictably, a sense of euphoria seemed to accompany the summary as it travelled higher and higher in the reaches of the Office for Civil Rights. On April 26 it was passed on to the Assistant Secretary's office by its addressee with the comment that "it show[ed] that the States are generally responsive and active in meeting their responsibilities."[141]

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[140] The summary rated each state as "successful," "acceptable" or "not acceptable"

> based on a perception of level of commitment and effort demonstrated by a State through the report from the regional office. The purpose of the assessment is to enable OCR to evaluate the overall national success of the MOA program, as carried out by the states. It is in no way to be considered an evaluation of regional office conduct of its oversight activities. . . . The best judges of these ratings are, of course, the regional office staffs, on whom we are relying to advise us of any grievous midjudgments.

[141] Note to Harry M. Singleton from Antonio J. Califa, Director for Litigation, Enforcement and Policy Service, OCR, April 26, 1983.

Perhaps reflecting the wishful thinking of a harried career staff, the transmittal continued: "In view of the Secretary's interest in State cooperation with Departmental objectives, you may wish to bring these findings to his attention."[142] A week later, Singleton's deputy Joan Standlee added the cryptic comment that "[t]he state MOA's appear to be functioning better than I had expected."[143]

These inflated estimates of what was really going on at the state level were exploded in a brief but devastating memorandum from Paul Chassey, an OCR attorney, to Assistant Secretary Singleton concerning "OCR's knowledge of Vocational Education Enforcement under the MOAs." This memorandum (of which we were furnished a copy in draft form) first listed eighteen discrete requirements for state MOA programs. As to thirteen of these, according to Chassey, "[b]ased on the LEPS' [summary] evaluation, OCR does not know whether these requirements were met." With respect to an additional three items, Chassey commented that the "[l]imited information in LEPS' evaluation precludes qualitative assessment of compliance with statutory requirements." The memorandum accurately diagnosed the state of OCR's knowledge about the MOA process:

> A. OCR cannot determine the quality of the states' on-site review program.

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[142] *Id*.

[143] Note to Harry M. Singleton from Joan Standlee, May 2, 1983.

> B. OCR cannot determine whether all relevant vocational issues were reviewed, i.e., site selection, admissions, race/sex isolated programs.
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> C. OCR cannot determine which standards are applied to on-site activity.
>
> D. OCR cannot determine if there is a national compliance program consistent in each state or if compliance programs differ from state to state.

(Chassey also made a series of recommendations for improving OCR's superintendence of the MOA program; these are discussed later in this report.[144]

On May 23, 1983, Assistant Secretary Singleton held a meeting of top headquarters staff to discuss the MOAs. Chassey was one of the participants. As a result of the discussions at the meeting, OCR headquarters staff conducted a telephone survey of the regional offices to update the information contained in the April summary. However, this "telephone survey was limited to the same kinds of questions posed in the original questionnaire and did not cover the *quality* of state MOA activity."[145] It concluded that "of the 17 states cited as having either an unacceptable or minimally acceptable status as a result of the December questionnaire to the regions, ". . . Six states have shown improved activity[,] Ten States have shown no change[,] One State has regressed in status."[146]

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[144] *See infra* pp. 179-180.

[145] Memorandum from Antonio J. Califa, Director for Litigation, Enforcement and Policy Service, OCR, to Harry M. Singleton, Assistant Secretary, June 14, 1983, at 1 n.* (emphasis added).

As a result of the meeting and survey update, Assistant Secretary Singleton appointed a task force within the agency to recommend improvements and modifications in MOA procedures. However, the results of this new initiative to date are problematical.

First, while the restudy of the MOAs produced a much more detailed set of instructions to the regional offices about their review of 1983 annual reports, consisting of a cover memorandum[147] and an accompanying document entitled "General Guidelines for Review of the 1983 Annual State Civil Rights Compliance Report for Vocational Education," the attachment to the memo was "developed from the Memorandum of Procedures (MOP) of July 1979" and merely reiterates what is (or should be) obvious from a reading of the MOP. It did not require regional offices to conduct a meaningful assessment of the quality of state programs.[148]

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[146] Id. at 2.

[147] Memorandum from Harry M. Singleton to Regional Directors, OCR, September 15, 1983.

[148] For example, the document advises that "a summary of the findings of each on-site review and a copy of each voluntary plan entered into with a subrecipient [are] crucial components[s] of the annual plan." "General Guidelines," at 4. However, regional offices are asked only to determine if the on-site review summaries indicate that all "the kinds of conditions, such as statistical disparities, that should trigger an on-site review" -- to the extent that those conditions

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Second, regional office MOA involvement has still not been made a matter of clearly understood priority. The memorandum on evaluations of the states' 1983 annual reports did not go out until *after* those reports had been distributed to the regional offices and may have caused some of the regions to redo tasks already begun; like the 1982 questionnaire it gave the regions less than a month to submit their findings to headquarters.[149] But in OCR's final Annual Operating Plan for FY 1984, no specific allocations of regional office staff or time to MOA activities are made.[150] Since the agency is subject to court orders regulating the time it may expend

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are suggested in the 1979 OCR Vocational Education Survey or other data for the subrecipient -- were "addressed in the state agency on-site review." The regions are apparently not to evaluate the correctness of state agency *conclusions* about whether or not there has been discrimination. Similarly, the "General Guidelines" direct the regional offices to examine the voluntary compliance plans accepted by state agencies with care, but only to determine if a "plan omits attention to" any issues raised by the findings of the on-site review. There is no suggestion at all that it would be appropriate for OCR to consider whether the plans which the states have accepted are minimally adequate to remedy probable violations identified in the on-site reviews.

[149] In jurisdictions with large numbers of school districts, area vocational-technical schools and/or post-secondary institutions offering vocational training, the annual reports can be fairly voluminous. For example, according to their 1983 annual reports, Texas conducted 199 on-site reviews; Massachusetts did 245; New York 43 (secondary level); Michigan, 26; Minnesota, 22; Missouri, 24; Nebraska, 21; New Jersey, 23 (secondary level); Wisconsin, 25 (secondary level); and Pennsylvania, 34.

[150] *See* 48 Fed. Reg. 57588, 57589 (December 30, 1983) (". . . no specific projections of resources to be allocated to particular activities have been added [to the draft AOP published on July 27, 1983, 48 Fed. Reg. 34094]").

on complaint investigations and compliance reviews, in effect all other activities must be "fit into" remaining time and resources.[151] The absence of target projections in the Annual Operating Plan or elsewhere, together with the traditional lack of contemporaneous and continuous direction and feedback from headquarters to the regions about the MOA process, create a significant risk of nonperformance. This impression was reinforced by our conversations with regional office staff, who indicated no sense that MOA work had ever been a major priority.

Third, this impression was also reinforced by two features of the instructions sent to the regions concerning the 1983 annual reports evaluation. Unlike the situation in prior years, OCR headquarters now wished to have not only some information about the progress of states in implementing their MOAs but also a large measure of control over regional office enforcement actions. Even if the regional offices concluded that there were "major deficiencies" in state performance, they were only to *recommend*, "if necessary," a formal compliance review to headquarters[152] and, in any event, OCR headquarters cautioned that

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[151] The September, 1983 memorandum to the regions (*supra* note 147 and accompanying text) does direct regional offices that if there are "major Title VI deficiencies" (see discussion of this limitation below), a letter to the Chief State School Officer should be prepared for the Assistant Secretary's signature indicating that a compliance review of the state's MOA procedures is to be conducted. That compliance review would be subject to the *Adams* court order time deadlines. September 15, 1983 memorandum, at 3.

> Meetings with state agencies regarding their annual reports may be scheduled only for the following reasons:
>
> 1. To obtain additional information or clarification about particular points or issues raised in the reports.
>
> 2. To provide technical assistance to state agencies upon their specific request.
>
> Negotiations with state agencies to correct deficiencies in the annual reports should not take place until the regional office has submitted its reports to the Assistant Secretary, as described below.[153]

Not only does this unusual requirement for prior clearance have the unavoidable effect of making regional offices more cautious about recommending strong enforcement action, but it has resulted in halting the MOA evaluation process entirely. Although all of the regions submitted their material to headquarters in a timely fashion, including proposed letters to the state agencies reflecting their findings, OCR headquarters still has not given approval for these letters to be issued despite the passage of many months since their submission. Once again, OCR appears to be missing an opportunity to enforce the law and to provide guidance to the states!

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[152] "General Guidelines for Review of the 1983 Annual State Civil Rights Compliance Report for Vocational Education," attached to September 15, 1983 memorandum, *supra* note 147, at 6.

[153] *Id.* at 5-6.

A further difficulty with the memorandum concerning the 1983 annual reports is its adherence to, and rigid interpretation of, OCR's position on MOA coverage under Title IX and Section 504.[154] Because language explicitly requiring the submission of nondiscriminatory "Methods of Administration has not yet been added to the Title IX or Section 504 regulations, the memorandum instructs the regions that "*no* attempt to remedy [Title IX and Section 504] deficiencies should be taken until further notice"[155] (emphasis in original). We reiterate that whatever the validity of OCR's position as far as the states' original obligation to send the government an MOA document covering Title IX and Section 504, the Assistant Secretary's articulation of that position to the Civil Rights Commission and to the Regional Directors is overboard and counterproductive. Indeed, in this instance it acts as a further deterrent to regional office consideration of the *quality* of state MOA programs, for it restrains criticism even of state decisions to accept patently insufficient remedies for prior actions which the state characterizes as violations of the two substantive statutes in question. OCR's approach simply guts the 1979 Guidelines by limiting regional office scrutiny to Title VI alone.

Finally, OCR continues to show undue deference to state MOA efforts, rather than fulfilling its legal obligation to examine the adequacy of those efforts with great care. Perhaps the clearest indication of this attitude is the agency's reluctance to conduct a civil rights compliance review of a district or institution which has already been covered in a state MOA on-site review. In the preamble to the 1984 Final Annual Operating Plan, OCR rejects the suggestion that such reviews be used as a means of assuring state MOA efficacy:

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[154] *See supra* pp. 67-69.

[155] September 15, 1983 Memorandum, *supra* note 147, at 2.

> Comment: OCR shoud [*sic*] conduct on-site reviews of a representative sample of subrecipients which the States have reviewed under their Vocational Education Methods of Administration [MOA] programs. . . .
>
> *Response*: No change is necessary. The OCR regional offices are responsible for reviewing the MOAs and evaluating performance as described in the annual reports which the States submit. It is also the responsibility of the regional offices to identify the deficiencies of any State program, to work with the State agencies to correct them, and to monitor their progress. OCR headquarters is conducting a complete review of regional office assessments of the latest MOA reports, and the Assistant Secretary will direct follow-up action as appropriate.

Thus the agency has eschewed what is perhaps the most effective means of gauging the depth and success of state procedures: re-reviewing representative subrecipients.[156] The regional office staff to whom we spoke indicated that there were virtually no circumstances in which they would re-review a subrecipient visited by a state; regional offices have eliminated institutions from previously established schedules for compliance reviews upon learning that they would be or had been the subject of a state MOA on-site visit;[157] and regional offices have omitted consideration or discussion of specific issues in conducting a compliance review where a state previously considered that issue.[158,159]

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[156] Commenting upon HEW's earlier experience with MOAs from state health agencies (*see supra* note 24), the Civil Rights Commission noted:

> The reviews strongly underscore, however, the need for continuous monitoring and spot checking of State-agency compliance activities.

U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort: A Reassessment* 315 (1973).

We recognize that there is great concern about imposing extra burdens on subrecipients to undergo a second compliance
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review, but for two reasons we do not think this is a persuasive justification for OCR's refusal ever to undertake such reviews. First, the need for a completely accurate assessment of how well a state MOA process is working to identify and remedy discriminatory practices justifies the burdens which will be created by periodic re-reviews of a sample of subrecipients. Second, if OCR receives a complaint about a subrecipient which has already been reviewed in the MOA process, it has the obligation, under the Adams order, to investigate it, "burden" notwithstanding.

[157] See, e.g., Memorandum from Dewey Dodds, Regional Director, OCR Region III, to Harry M. Singleton, April 19, 1982; letter from W. Lamar Clements, Director, Elementary and Secondary Education, Region IV, OCR, to Dr. Charles E. Holladay, Superintendent, Mississippi State Department of Education, June 25, 1982, at 2 ("In order to avoid duplication of reviews, we request that OCR be notified after the sub-recipients have been selected for on-site visits, so that we may share information before and after an investigation of a district").

[158] "Because the Pennsylvania Bureau of Vocational Education addressed Issues 1, 3, and part of Issue 2 of our review concerning access to home economics and industrial arts course offerings, we determined that we would accept their findings in those areas and restrict our review to the issue of access to course offerings in physical education." Investigative Report, Docket No. 03-82-5002, Region III, OCR, February 17, 1982, at 8.

[159] It should also be noted that the comments from the preamble to the final 1984 AOP quoted above are misleading. Although

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The overall result of OCR headquarters' posture has been to send a message to the regional offices that strong enforcement action against states whose MOA execution is defective will not be supported. Since 1979 no state has received a formal Letter of Findings (LOF) about the deficiencies of its MOA process as a result of an OCR desk or on-site review.[160] The California State Department of Education apparently received a preliminary LOF in 1983; although the regional office correctly concluded that not a single subrecipient of this agency had ever been the subject of *either* a desk audit *or* on-site review, negotiations with the state agency dragged on interminably. In January, 1984 representatives of four civil rights groups filed a complaint with OCR about California's lack of MOA activity. Assistant Secretary Singleton responded that there were serious problems in California,[161] but this only makes it more difficult to understand why OCR did not pursue vigorous enforcement steps earlier.

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regional offices do review the states' annual reports, their instructions conspicuously omit references to evaluating the *quality* of state activities, as we have explained above. And those instructions, together with headquarters' lethargy, have prevented or at the very least impeded the regions from "work[ing] with the State agencies to correct ["deficiencies"]." The response, therefore, in no sense justifies OCR's unwillingness to review subrecipients already visited by a state.

[160] A formal Letter of Findings is a prerequisite to any enforcement action.

[161] Correspondence relating to this complaint is attached as Appendix G.

It is likewise extraordinarily hard to fathom why it took OCR a year and a half to conclude that there was no merit to New Mexico's assertions that its MOA scheme need not include secondary level vocational training because all of the state's Vocational Education Act funds were expended at the post-secondary level.[162] While this not very difficult question was being pondered in Washington, as we have indicated[163] the various regions were taking inconsistent positions on the matter in their dealings with the states!

In sum, OCR's efforts to date to monitor and assess state MOA implementation may be described as sporadic, uncoordinated, inefficient and unenthusiastic. Unquestionably, since 1981 this pattern has reflected not only the disorganization and lack of effective planning which accompanied the promulgation of the Guidelines and submission of the MOAs themselves, but also the new national administration's distaste for the legal processes of civil rights enforcement. Within OCR, the administration has placed an emphasis upon voluntary compliance negotiations rather than fund termination proceedings, and upon technical assistance instead of compliance reviews, remediation plans or enforcement. Upon completion of its investigations, OCR now rarely issues Letters of Findings which flatly describe past or present conduct as being discriminatory and require a recipient of federal funds to submit a corrective plan for the agency's approval. Instead, the investigation, liability determination and remedial negotiation stages are collapsed so that the letter which is issued incorporates the corrective steps which a recipient agrees to take. These are typically characterized as being adequate to bring the recipient into compliance with the civil rights statutes, allowing OCR to "close" its investigation with the issuance of the letter.[164]

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[162] See supra pp. 74-75.

[163] Supra pp. 76-77.

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[164] There may be nothing inherently wrong with this approach, but in practice it often leads to inadequate descriptions of the discriminatory practices which a recipient was found to have committed, thus making it difficult to determine if an adequate remedy for the conditions which actually exist has been required. In a manner analogous to statistical "regression to the mean," the violations found seem to have a tendency to dovetail neatly with the scope of the corrective actions to which a recipient will agree. In some instances of OCR vocational education compliance reviews which we examined, for example, problems identified in the investigative report were not mentioned in the Letter of Findings. See infra pp. 132-133 & n.232. As one study of civil rights enforcement put it:

> Of course, a "violation-corrected" finding does not prove that a school district is in full compliance; it could mean that OCR did not seek remedies for all possible violations discovered in the course of a review or investigation (which could be a useful leverage in negotiations).

P. Hill & E. Marks, Federal Influence Over State and Local Government: The Case of Nondiscrimination in Education 85 n.10 (Rand Corp., No. R-2868-NIE, 1982). OCR strongly favors "violation-corrected" LOFs: it has authorized its regional offices to issue these letters without the prior headquarters approval required for "violation-only" letters. Id. at 25 & n.16.

OCR officials have repeatedly emphasized to us that they want to increase the effectiveness of state MOA processes by providing technical assistance rather than by bringing enforcement proceedings every time there is a deviation from the standards of the MOP, especially in the early years of the states' experience with the MOAs. We turn, therefore, to a consideration of OCR's technical assistance record, capabilities, and plans.

Chapter 7. "Technical Assistance" vs. Enforcement

SUMMARY: In the preceding chapter we observed that the Department of Education has failed to develop a credible and effective mechanism for monitoring state implementation of their vocational education MOAs and for enforcing Section II of the Guidelines. So also have poor planning, ineffective management, and the lack of a strong commitment to put resources behind the MOA process drained the capacity of the Department to offer "technical assistance" to improve state performance.

OCR's redefinition of the term to include any post-investigation negotiation of a remedy with a subrecipient makes it nearly impossible to determine what aid it is providing to the states, especially since it does not require its regional offices to report MOA-related assistance separately to headquarters.

Training and materials have been offered to state personnel only in 1980 and 1982 and, despite the recommendations of both contractors who provided this training, materials have not been updated and no further training has been conducted or planned.

The technical assistance function is assigned to separate units within the regional offices that were originally established to provide guidance about Section 504; two years ago an OCR headquarters supervising official questioned the adequacy of their expertise in Title VI and Title IX matters.

The regional offices themselves assign no priority to offering technical assistance to the states. Their primary concern is meeting the court-imposed time deadlines for complaint investigation; no Regional Director's or supervisor's performance evaluation has ever focused on either technical assistance or the state MOAs; and their staffs have received training in this area only once, in September, 1981.

Furthermore, the Department has failed to commit adequate resources to technical assistance. Regional offices have had to turn down state requests for on-site assistance because they lack funds to pay for the travel involved; OCR reallocated funds appropriated for external contracting to provide technical assistance in FY 1981 and FY 1982 in order to pay salaries and expenses, and subsequent budget requests have included little or no money for this purpose.

> Incredibly, the FY 1981 and 1982 budget requests were justified on the ground that OCR lacked the staff expertise and training to deliver technical assistance, while the more recent omission of this item is justified by Assistant Secretary Singleton on the basis that OCR's staff "will now do technical assistance work that was previously contracted out." Nothing within the agency has changed substantially during this period of time.
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> In sum, the Department lacks any significant capacity effectively to assist the states in carrying out their MOAs.

If, as indicated in the preceding chapter, OCR has yet to devise a workable mechanism for monitoring state MOA implementation, and if there is an absence of commitment to a strong enforcement role for the agency in this (or any other) area, then the entire burden of assuring that legal requirements are complied with is made to depend upon the efficacy of the "technical assistance" which OCR provides to the states. It is therefore appropriate to examine with some care how OCR has structured the delivery of "technical assistance," what its experience since issuance of the Vocational Education Guidelines in 1979 teaches, what its substantive capability and expertise is to perform this function, and what current plans the agency has to maintain or increase its activities in this arena.

In the preceding paragraph the words "technical assistance" are placed within quotation marks because the meaning of the term has been altered in recent years. Originally, OCR's mission was primarily investigation and enforcement of anti-discrimination laws. The concept of technical assistance as an alternative series of actions which could promote compliance with statutory requirements became prevalent as the agency began to deal with subtle mechanisms of discrimination and more complex problems. For example, if OCR began to implement the principle that placement tests which have a racially disparate impact[165] may not be used unless they can be validated as educationally necessary,[166] recipients

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[165] *See generally Guardians Association v. Civil Service Commission of New York*, 77 L.Ed. 2d 866 (1983).

[166] The principle was recognized by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that employment discrimination suit, the Court held that when Congress passed Title VII of the Civil Rights Act of 1964, it intended to eliminate all practices which disproportionately excluded blacks from employment opportunities unless those practices met the "business necessity" test -- *i.e.*, unless they were necessary to the continued operation of the business. Under this standard, for example, Duke Power Company's high school diploma requirement for factory jobs which could be performed by employees lacking such credentials was held to be discriminatory.

A similar principle is applied in that part of the Vocational Education Guidelines which bars the use of criteria for admission to a school, program, or course of vocational education if those criteria have a significantly disparate impact upon applicants from a protected class (racial or ethnic minority students, females, or handicapped persons) unless the criteria can be validated as necessary for *participation* in the instructional process. *See* § IV.K., 44 Fed. Reg. at 17166 (March 21, 1979).

The formulation in the Vocational Education Guidelines is carefully and deliberately chosen. It prohibits admission criteria which reflect the likelihood that a student will perform very well in a vocational course or program, allowing as prerequisites only those skills or characteristics which are essential to *participation* -- in other words, forbidding ranking or "creaming" but assuring that candidates have minimal qualifications. *Cf. Regents of the University of California*

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would often need assistance in understanding, developing and using proper validation procedures.[167] Guidance would also be necessary for most school districts seeking to eliminate physical barriers which limited the access of orthopedically handicapped individuals to buildings or classrooms.[168] Enforcement and technical assistance were originally conceived as separate functions.[169] In enforcing Title VI, for instance, OCR investigated cases of continuing school segregation and took enforcement actions; generally the agency did not devise

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v. Bakke, 438 U.S. 265 (1978). Any other standard could unnecessarily restrict opportunities for blacks, women or other minorities or for handicapped individuals. The Federal Education Project and other groups pressed hard in 1978 and 1979 to get OCR to adopt the correct standard. See 44 Fed. Reg. 17172 (March 21, 1979) (Comment #42 and Response).

[167] In the employment discrimination field, the applicable principles are better developed. The Equal Employment Opportunity Commission and other federal enforcement agencies have promulgated Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1601 et seq., which incorporate minimum validation requirements. In addition, the American Psychological Association has adopted test validation standards and there is an established practice of job evaluation. In contrast, the process of validating criteria upon which access to educational opportunities depends is far less well defined. See, e.g., Debra P. v. Turlington, 474 F. Supp. 244, 257-61 (M.D. Fla. 1979), rev'd, 644 F.2d 397 (5th Cir. 1981).

[168] A frequently cited example of technical assistance by OCR is the suggestion made by a regional office that a school district whose chemistry laboratory was inaccessible -- because it was located on the top floor of a building without an elevator -- need not install a $60,000 elevator in order to comply with Section 504 but need merely create a portable lab in a first floor art classroom.

[169] The 1980 Memorandum of Understanding with OVAE (see supra note 117 and accompanying text) assigned technical assistance to OVAE and enforcement to OCR but no training for OVAE staff has ever been provided by the Department and the MOU was ignored, see id.

solutions. Technical assistance and advice on developing desegregation plans were available from separately funded[170] desegregation assistance centers located regionally, usually at universities. Any discussion between recipients and the OCR staff following an investigation, or during negotiations once formal enforcement activity had been commenced, was still considered a compliance function. More recently "OCR has redefined technical assistance to include" "providing advice on methods of remedying problems [investigators] have identified."[171]

The point of our discussion here is not to resolve the definitional question but merely to note the ambiguity of the term as now employed by OCR. In evaluating current figures on technical assistance furnished by the agency it is critical to separate the two categories of activity covered by the term. "Technical assistance" provided during or following a compliance review or complaint investigation is recipient-specific and usually limited in scope and duration. The more traditional usage of the term covers organized instruction, the preparation and dissemination of materials or model procedures, and responses to inquiries not directly prompted by compliance activities.

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[170] Under Title IV of the 1964 Civil Rights Act. These centers have been expanded in purpose and programs have been established to provide aid in complying with Title IX and in meeting the needs of students with limited English proficiency.

[171] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 20 & n.56 (June, 1982). As the Commission noted, unlike more traditional forms of technical aid, "such assistance is not likely to prevent other violations or inform individuals of their civil rights protections," id. at 20.

With respect to state MOAs, OCR's record in offering technical assistance is as inadequate as its enforcement program. We have described previously the two technical assistance contracts awarded by OCR for the purpose of furnishing training to state personnel.[172] Apart from the untimeliness of the guidance in preparing the MOAs themselves and the noninvolvement of OCR in this training,[173] the fact is that both contractors recommended regular updating and retraining for state personnel, but this advice has been ignored.[174] Regional offices have emphasized the extent of turnover among state personnel involved with the MOAs and suggested the need for greater training and organized technical aid to the states.[175] OCR headquarters, however, has neither provided for additional training to the states nor structured the agency's operations to guarantee that assistance is forthcoming.[176]

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[172] See supra pp. 23-30, 46-56.

[173] OCR neither evaluated nor approved the "model MOAs" used for training purposes. See supra p. 25.

[174] See supra notes 59, 63 & 74 and accompanying text.

[175] See supra notes 132, 137.

[176] The Rand Corporation compared OCR's technical assistance record with that of the Office of Special Education, which is concerned with programs for handicapped students:

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For several years following the promulgation of the Guidelines, OCR headquarters relied exclusively upon the regional offices to deliver all technical assistance except for the two outside contracts previously described, but it made no attempt to insure that the states received the guidance and training which they needed. Although the agency has recently instituted a monthly statistical TA (technical assistance) reporting system from the regions to headquarters, these submissions do not separate out TA[177] dealing with the MOAs from that related to other subjects.[178] This function is, theoretically, the responsibility of the Regional Technical Assistance Staff (RTAS), an organizational sub-unit within each of the regional offices. These groups were originally set up to provide guidance about the requirements of Section 504[179] and as recently as March, 1982, the OCR headquarters official supervising them estimated that most lacked "the necessary

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> In contrast, OCR's technical assistance activities are very limited. Lacking funds for major external grants programs, OCR can provide few of the training sessions, manuals, and compliance case histories that OSE has provided so abundantly.

P. Hill & E. Marks, *supra* note 164, at 54.

[177] Of course, in light of OCR's redefinition of the term, these reports include all post-investigation contact with a recipient within the category of "technical assistance."

[178] The reports group the statistics by antidiscrimination provision (Title VI, Title IX, etc.).

[179] *The Federal Civil Rights Enforcement Budget: Fiscal Year 1983*, *supra* note 170, at 21 n.59.

expertise in Title VI and Title IX."[180] OCR's Washington staff has never established a target for these groups' work in connection with state MOA personnel -- for example, a requirement that each state be visited on-site once a year, etc.[181] In fact, since September 1983 regional personnel have been restricted from providing technical assistance except upon request of the states.[182] Our discussions with regional office personnel indicated that they rarely took the initiative in providing MOA technical assistance anyway, since it has never seemed to enjoy a high priority within OCR[183] and because there were no funds in regional office budgets to pay for organized training by regional staff, etc.

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[180] *Id.*

[181] The FY 1984 Annual Operating Plan allocates no specific amounts of time to this or any other function in any region. *See supra* note 150 and accompanying text.

[182] *See* excerpt from Singleton Memorandum quoted in text, *supra* p. 100.

[183] Neither a region's monitoring of state MOA implementation nor its provision of technical assistance in this specific area is an explicit part of OCR's performance appraisal system for Regional Directors. (This was one of the recommendations made by Chassey, *see supra* note 144 and accompanying text.) "Technical assistance" is one of the criteria by which Regional Directors are judged, but as we have noted this term is a very broad one, indeed. No Regional Director, Division or Branch Chief to whom we spoke could recall the subject of the MOAs ever coming up during a performance evaluation.

When a region attempted to demonstrate initiative in providing technical aid it received no encouragement; in the fall of 1982 Region VIII sent headquarters an MOA technical assistance packet (consisting mostly of model forms and procedures for conducting on-site reviews) which it had developed and used for training purposes when it did on-site MOA reviews in the states. To our knowledge, the region never got a response; its materials were neither evaluated nor disseminated.

In light of these factors, it is again not surprising that OCR's program of "technical assistance" to the states is haphazard at best. Apart from the CRC and ACCD contracts in 1980 and 1982, virtually no guidance except for occasional telephone calls or letters and annual report monitoring letters[184] has been provided to state personnel about the nuts and bolts of the compliance program which they are supposed to be operating.[185]

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[184] The materials relating to technical assistance which we obtained from the regions through FOIA requests indicate that for the most part, "TA" was limited to answering simple questions on the telephone. More difficult requests, such as for help in writing computer programs to analyze data in desk audits, could not be answered by regional office staff and simply have never been answered by OCR headquarters.

[185] When we met with OCR headquarters staff on this subject, it was suggested that there had been several additional interchanges with the states, such as three workshops on MOA implementation in individual states. (We heard from other sources that the staff member who made these visits was required to take annual leave for this purpose and that the states themselves paid the expenses of the workshops.) We did not seek to establish what had actually occurred. Even if the workshops were official OCR business, the level of assistance thus provided is minimal in contrast to the need. OCR headquarters personnel also claimed that they had provided "training for the state staff responsible for implementing the OCR guidelines on Vocational Education" from a dozen additional states. No supporting information was ever furnished. We believe that this claim covers speeches or visits by OCR staff to states in which the subject of the MOAs may have been mentioned or addressed tangentially. According to materials we received from OCR, the Program Review and Assistance Service in Washington, which supervises the RTAS units in the regional offices, proposed a training project to be conducted by OCR person-

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In terms of structure, management and the creation of incentives, therefore, OCR has not made adequate provision for its staff to give the states the kind of technical assistance they need. The agency also has failed to utilize its outside contracting authority to fill this gap. Although OCR used outside contractors in 1980 and 1981 to facilitate the inception of the MOA process, it has steadily cut its external technical assistance budget since that time.[186] In 1980 OCR budgeted $8.7 million for external technical assistance and obligated $5.6 million of that sum, including $205,719 for the model MOA training.[187] In 1981 the budget included $8.0 million for this purpose and $5.25 million was appropriated; OCR spent $4.8 million,including $312,173 for the MOA implementation training sessions conducted in the spring of 1982.[188] While these substantial budget requests had been justified on the ground that OCR's own staff lacked the expertise and capability to deliver outside training,[189] money appropriated for this purpose was actually expended

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nel for regional office and state staff on the Guidelines and MOA process, to be "developed and carried out in the fall of 1983." The project never occurred.

[186] *See* *The Federal Civil Rights Enforcement Budget: Fiscal Year 1983*, *supra* note 171, at 18-20.

[187] *See* *supra* pp. 23-30.

[188] *See* *supra* pp. 46-56.

[189] *See* U.S. Department of Education, *Justification of Appropriation Estimates for Committees on Appropriations, Fiscal Year 1981*, Vol. II, at 350.

for salaries and overhead expenses, forcing OCR to weaken the effectiveness of external TA.[190]

The 1982 budget request upon which appropriations were based included $8.45 million for outside training and technical assistance but OCR expended only $560,000 of this amount for this function; the balance was "used for built-in increases, such as pay increases, because it [OCR] will not be allowed a supplemental appropriation sufficient to cover them."[191] No funds were spent for external TA relating to the MOA process. For 1983, the administration slashed the budget request by 80% in this area, to $1.3 million[192] and only $15,000 was actually expended, for distribution of previously prepared written materials. For 1984 the administration again proposed a drastic reduction in technical assistance funds, which Assistant Secretary Singleton justified on the basis that the Department "will now do technical assistance work that was previously contracted out."[193] As we have indicated, however, OCR has not replaced or continued structured training for state MOA personnel[194] and the level of ongoing technical assistance provided through the regional offices has been low.

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[190] For example, in 1981 OCR restricted the use of these funds to pay for participant travel to training sessions, "an economy that may limit the workshops' effectiveness." The Federal Civil Rights Enforcement Budget: Fiscal Year 1983, supra note 171, at 19 n.50. When asked about technical assistance to state MOA personnel recently, staff at one regional office pointed out that they had no funds available to pay for the travel costs of state participants.

[191] Id. at 19 n.52.

[192] OCR's overall appropriation declined only slightly, from $45.8 million in 1980, $47 million in 1981, and $45 million in 1982 to $44.8 million in 1983.

Furthermore, there is serious justification for questioning the institutional capacity of the agency to provide meaningful TA to the states. In 1980 the outside contractor working on the model MOA project complained about its inability to obtain policy clarifications from OCR.[195] More recently, it took OCR headquarters a year and a half to arrive at the conclusion that New Mexico's secondary schools are "subrecipients."[196] Regional office personnel to whom we spoke admitted that they could not give the states any assistance concerning the Guidelines' coverage of funding for vocational programs[197] because no one in OCR could explain it nor had any investigative materials or models on the subject been developed. (No OCR compliance review of vocational training has ever explored this area, to our knowledge.) Finally, the regions are in much the same position as state MOA staff.

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[193] See Education Daily, February 2, 1983, at 4.

[194] See supra p. 56.

[195] See supra, text at n.36 and following n.40.

[196] See supra pp. 74-75.

[197] See supra note 68 and p. 62.

Their own vocational education complaint investigations and compliance reviews are not regularly reviewed, nor even consistently sampled as part of headquarters' quality assurance process. Thus, the regions receive no effective feedback on the quality of their own enforcement techniques in implementing the Guidelines nor on the adequacy of the remedial actions which they negotiate with recipients. At best, the regions may be prepared only to replicate whatever weaknesses exist in their own approaches to the enforcement of Title VI, Title IX, Section 504 and the 1979 Guidelines in vocational education. Unfortunately, as we describe in the following chapter, regional office performance in this area is inconsistent and deficient.

Thus, we conclude that OCR's current technical assistance effort is marred by the same inadequacies of planning, structure and management which limit the effectiveness of its direct MOA oversight. As carried out by OCR, "technical assistance" simply is not a technique which can facilitate substantial compliance with federal nondiscrimination requirements in vocational education. Thus the agency's shift away from enforcement actions and towards professed greater "technical assistance" is simply a device guaranteeing that the federal contribution to an effective state MOA process will remain meager, if not nonexistent.

Chapter 8. The Record of OCR Investigations

SUMMARY: Although OCR's own compliance experience in the vocational education field was very limited prior to the issuance of the Guidelines in 1979, the agency has not since that time made a purposive effort to increase its activities in this subject matter area, either (1) to ensure adequate enforcement of the substantive provisions of the Guidelines; (2) to provide "models" of investigations and reviews to state MOA personnel; (3) to develop more detailed explication of policy on unfamiliar subjects covered by the Guidelines, such as funding patterns; or (4) to obtain practical knowledge which will improve its ability to assist states in carrying out their MOAs.

Lacking any commitment or direction from headquarters, the OCR regional offices' work in vocational education has varied widely in intensity and adequacy, a result complicated by headquarters' failure to establish any quality control mechanism to review regional office performance in voc ed.

We examined 107 OCR reviews and investigations of providers of vocational education conducted between 1979 and 1982. Not one explored the issue of funding patterns, for example, and little if any attention was paid to questions with which the states find it most difficult to deal, such as racially identifiable school campuses, site selection, or admissions criteria. Moreover, we found instances in which regional offices appear to have misapplied the standards of the Guidelines in areas such as validation of admissions criteria and the existence of schools or campuses with student populations highly imbalanced by race or sex.

In some cases, important issues raised in compliance investigations (and reflected in internal Investigative Reports) were simply omitted entirely from Letters of Findings.

On most questions, there was no uniform investigative or analytical approach, either among the regional offices or, sometimes, within the same office! By permitting this state of affairs to occur and continue, OCR has both substantially weakened enforcement of the civil rights laws in vocational education and also deprived state MOA staffs of a source of meaningful expertise and advice.

As we previously have indicated, prior to the issuance of the Vocational Education Guidelines in 1979, OCR did not have a great deal of experience in evaluating vocational education institutions for compliance with nondiscrimination requirements.[198] It was precisely this lack of experience and attention, in fact, which was a key element of the vocational education claim in the _Adams_ litigation. Since the Guidelines represent a historic and worthy attempt to elaborate the substantive nondiscrimination obligations of those who provide vocational training, and since Part II of the Guidelines -- establishing the MOA process -- contemplates a larger enforcement role for state agencies under OCR guidance, it would be natural to presume that after the Guidelines were issued, OCR would have conducted a well-planned program to develop staff expertise in the vocational education area.

We have seen that one component of such a comprehensive effort -- organized training of OCR personnel -- has never been undertaken in a serious manner. Not until 1981 did the agency conduct a training workshop for regional office personnel, and that session, whatever its limitations, has never been repeated.[199] But apart from such formal pedagogical exercises, two additional strategies can immediately be identified which, if implemented, might have provided a means of enlarging the agency's capacity to provide leadership and guidance to the states in their execution of the MOAs. First, it would be natural to expect a substantial increase in the conduct of vocational education complaint investigations and compliance reviews by OCR regional offices. This "hands on" experience could be expected to provide the background and understanding necessary to increase the effectiveness of OCR staff in working with state agencies to improve their MOA performance. Second, since the Guidelines provide a much more detailed explication of what Title VI, Title IX and Section 504 require of institutions offering vocational training than had previously been available to either recipients _or_ OCR's own regional staff, a natural follow-up activity to their issuance would have been a series of pilot reviews in some of the more difficult areas such as site location and funding mechanisms. Such pilot reviews, perhaps selected and directed from OCR headquarters, could offer valuable lessons to state officials in developing investigative and compliance techniques under the Guidelines.[200]

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[198] _See supra_ pp. 8-10.

[199] As this report was receiving its final editing in April, 1984, we learned that OCR headquarters had conducted another training session on the MOAs for some regional office personnel in late March, 1984.

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[200] A third component of a well-conceived plan to enhance the utility and effectiveness of the MOA process would have been the establishment of a mechanism to identify, resolve, record and disseminate official policy determinations on substantive questions arising under the Guidelines. (We noted in the previous chapter that at least one OCR Regional Director has explicitly suggested this, _see_ _supra_ note 134). No such system has been implemented. Although for a brief period from 1979 to 1981, OCR did publish a "Digest of Significant Case-Related Memoranda," consisting of "summaries of significant case-related policy clarification memoranda," the publication was never given widespread dissemination and the practice has been discontinued.

Regrettably OCR has never undertaken either of these efforts. Moreover, while there has been -- in some regions of the country more than in others -- an attempt after 1979 to increase the level of activity in vocational education, the lack of any effective quality control (either at the regional offices or by headquarters) has resulted in enforcement actions of widely varying quality and rigor. Far from providing a model for the states, in all too many instances OCR's investigations have simply demonstrated that the federal agency is capable of doing a superficial, lackluster job which is hardly likely to cause changes in traditional enrollment patterns.

In order to assess OCR's post-Guidelines record, we obtained, through the Freedom of Information Act, all Letters of Findings (and Investigative Reports, where available) for vocational education reviews and complaint investigations conducted during a three-and-one-half-year period after March, 1979. We reviewed all of these documents and attempted to evaluate the depth and quality of the compliance efforts which they represented. In particular, we looked for examples of regional office methods or decisions which reflected an accurate appreciation of the substance of the Guidelines, as well as for examples of errors of interpretation or execution that would limit the utility of a review as a model for the states. We did not find as much of the former as we would have wished.

In this part of the research, we examined a total of 107 Letters of Findings and/or Investigative Reports from regional office compliance reviews or complaint investigations involving vocational education. There was a very substantial variance in the number of cases of enforcement activity in vocational education among the regions. One region did only one such review in 3-1/2 years, while another did 34.[201] Some reviews and investigations were quite comprehensive, while others were limited to a single statutory authority[202] or to a single aspect of a school or institution's procedures.[203] None of the regions appeared to have devised or employed a standard guide or format for conducting a review or investigation similar to the outlines prepared by the ACCD contractor[204] which OCR has itself urged the states to employ in carrying out their MOAs. None of the materials we examined showed that OCR was grappling with the development of investigatory methods for some of the most potentially far-reaching but difficult aspects of the Guidelines. For instance, the Guidelines require the use of nondiscriminatory formulas or other fund allocation mechanisms governing the distribution of Federal, State or local vocational education funds.[205] In interviews with training contractors and OCR officials, we were told that this subject was deliberately omitted from the training sessions and materials at the direction of OCR because no one understood how to apply the Guidelines. Thereafter, OCR regional offices also avoided the subject rather than seeking to demonstrate principled application of the Guidelines in this area; there was not a single mention of this subject in the 107 reviews and investigations we looked at.

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[201] The number of reviews or investigations per region involving vocational education was 3, 10, 4, 27, 1, 17, 2, 2, 34, and 7, respectively.

[202] OCR Docket No. 08-81-6005, Letter of Findings, June 15, 1981, for example, was limited to Title VI; so was Docket No. 09-82-6011, Letter of Findings, June 11, 1982; No. 09-82-6022, Letter of Findings, July 9, 1982, was devoted exclusively to Title IX issues.

[203] OCR Docket No. 01-79-5029, Letter of Findings, March 30, 1981, examined admissions policies and practices only; No. 06-79-6038, Letter of Findings, September 4, 1980, was limited to job placement, for example.

[204] See supra pp. 46-56.

We found little attention being paid to issues with which the states find it most difficult to deal, such as racially identifiable school campuses, site selection practices, or admissions criteria. In fact, when the regional offices did consider these subjects, they did not always correctly apply the published Guidelines standards. For example, in OCR Docket No. 06-82-6005, the regional office learned that applicants for enrollment in a vocational education center were required to take the GAT-B examination.[206] For those with high school

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[205] Part III; 44 Fed. Reg. at 17165.

[206] The General Aptitude Test (GAT) is a pen-and-pencil examination which purports to measure an individual's aptitudes for a variety of types of occupational positions requiring, for example, the ability to grasp spatial relationships from diagrams, etc. See also infra, text at n.209.

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diplomas or GED equivalency certificates, the GAT-B scores were "used as a counselling tool only in [these] 80-85% of the cases."[207] However, for applicants without these other credentials, the test score was used as an admissions criterion and may have accounted for the rejection of up to 12 applicants in a single year. The Guidelines clearly state that admissions criteria must be "validated as essential to *participation* in a given program" if they have a disproportionate adverse effect upon applicants of a particular race, sex, ethnic background, or upon handicapped applicants.[208] Even though the OCR regional office noted that " . . . an EEOC decision in December 1971 ruled that the GATB was racially biased in the areas measuring General Learning Ability, Verbal Aptitude, Numerical Aptitude, and Clerical Perception,"[209] it found no violation in the use made of GAT-B scores by the institutions under review, for two reasons: First, the Investigative Report noted, "there are certain aptitude measurements for each field of training which have been found to predict *success* for that particular field" (emphasis added).[210] As we have previously noted, this is an incorrect validation standard.[211] Second, the regional office found, "the GATB is used as a counselling tool only in 80-85% of the cases of . . . applicants, and there is no information to indicate that this test is preventing Black applicants from enrolling."[212] It is of little comfort to the dozen applicants who may have been rejected in one year because of GAT-B test scores to know that the other 85% of the institution's applicants were admitted without regard to their scores.[213] As to the evidence of impact upon Blacks, the regional office itself noted the EEOC's determination of bias but the Investigative Report did not indicate that OCR compared the scores of admittees and applicants of different races.[214] The conclusion seems inescapable that OCR should have told the school to stop using the test score as an admissions criterion.

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[207] Investigative Report, OCR Docket No. 06-82-6005, p. 16. The test scores also were used as a factor in connection with all applicants for an LPN program. *Id.* at 11.

[208] Part IV.K.; 44 Fed. Reg. at 17166 (emphasis added).

[209] Investigative Report at p. 16.

[210] *Id.* at p. 9.

In another instance, a regional office conducted a review of a county-wide vocational-technical district which provided vocational training for students enrolled in the regular (K-12) districts within the county on an elective basis.[215] The delivery system chosen by the vocational district was to build small units on existing high school campuses within the county.[216] There was considerable course duplication at the sites, and there was also substantial variation in the racial composition of each facility's enrollment. However, the regional office apparently did not seriously examine whether or not this scheme had "the effect of excluding, segregating, or otherwise discriminating against students on the basis of race, color, or national origin" or whether all of the sites were "readily accessible to both nonminority and minority communities and . . . do not tend to identify [a] facility or program as intended for nonminority or minority students."[217] Instead, because " . . . the number of minority students attending the [campuses of the vocational district] is proportional to the number of minority students in the various feeder districts,"[218] the regional office concluded that there were "no identifiable program assignments based on race or national origin."[219] Similarly, the same regional office reviewed another county-wide district that operated two large facilities.[220] One was nearly 50% Black and Hispanic but the other enrolled less than 5% minority students. The campus with a substantial minority enrollment had been constructed in 1925 and the second facility in 1972.[221] The practices of the vocational district and the feeder school systems strongly suggested that the older building may have been perceived as a minority school: one heavily minority constituent district had a "policy of steering minority (and nonminority) students to [the older campus]" and in fact refused to provide transportation to the other site,[222] while the vocational district's own recruiting teams utilized student volunteers who were selected to be representative of the already established racially identifiable makeup of each campus.[223] The regional office obtained the vocational district's agreement to alter the method of selecting students to participate in the recruiting teams and accepted the district's proposal "to forward a letter to all sending districts relative to OCR's findings and the [district's] policy of admitting students to both campuses"[224] to deal with "steering" by feeder schools, but it required no further action with respect to the developing racial patterns at the two campuses.

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[211] See supra note 166.

[212] Investigative Report at p. 16.

[213] Cf. Connecticut v. Teal, 457 U.S. 440 (1982)(test which disproportionately disqualified minority candidates from further consideration for promotion must be validated as adequately job related even if number of minorities actually receiving promotions is not disproportionate to their representation in the work force).

[214] "In conclusion in the absence of applicant information, the [data] give[ ] no indication that [the school's] admissions policies, practices, or procedures have a discriminatory effect on minority applicants. . . ." Investigative Report, at p. 21.

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[215] OCR Docket No. 02-82-5002, Letter of Findings, June 14, 1982.

[216] There were eleven facilities operated by the vocational district, consisting of buildings housing, respectively, 7, 6, 5, 5, 6, 3, 5, 4, 4, 4, and 3 classrooms.

[217] Vocational Education Guidelines, § IV.A; 44 Fed. Reg. at 17165.

[218] Docket No. 02-82-5002, Investigative Report at p. 9.

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[219] Id. at p. 13.

[220] OCR Docket No. 02-81-5009, Letter of Findings, July 31, 1981.

[221] Docket No. 02-81-5009, Investigative Report at pp. 3-4.

[222] Id. at pp. 13-14.

[223] Id. at pp. 21-22.

This approach should be contrasted with the action taken by the same regional office in connection with a Title IX violation by yet another county-wide vocational district which the region examined. In this case, the district had, nearly fifty years before, constructed separate vocational schools for "boys" and "girls." At the time of the review, the school enrollments were substantially different and the schools remained identifiable by sex, in large part because the "boys" school offered only programs traditionally selected by male students and the "girls" school courses traditionally chosen by females. The regional office found a Title IX violation[225] and obtained the vocational district's agreement to relocate courses between the schools to disestablish their traditional identities.[226] Thus, while the regional office's performance in this case provides a useful analytical and remedial model for the states, its record with respect to racially segregated or imbalanced sites does not.

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[224] *Id*. at p. 14.

[225] OCR Docket No. 02-80-5009, Investigative Report, May 16, 1980.

[226] OCR Docket No. 02-80-5009, Letter of Findings, July 31, 1981, p. 2.

Of course, pursuing a correct analytic approach hardly guarantees that an enforcement agency will reach the right result. Another region reviewed a two-campus area vocational-technical school with one 94%-male facility and the other having only 40% male enrollment.[227] The heavily male campus offered only trditionally male courses plus cosmetology, and "[i]f the cosmetology program was not offered at the West Campus, then the facilities would have a total male population."[228] Instead of considering whether the curriculum and method of operating the facilities had the effect of discriminating,[229] the initial Investigative Report concluded that " . . . the underavailability of female enrollment at the West Campus could not be attributed to any deliberate design to limit the female enrollment."[230] Subsequently, amendments to the Investigative Report were prepared which stated: "Although the District has taken, by changing the course descriptions [which formerly used references to students of one sex only], affirmative steps to eliminate discrimination against females, its efforts have not sufficiently corrected the continued sexual identification of the West Campus. . . . the District is in violation of Title IX . . . ."[231] Although the amended language of the Investigative Report represents a proper application of the Guidelines, the Letter of Findings ultimately issued in this matter contained no reference whatsoever to the problem of disproportionate enrollments according to sex between the two campuses![232]

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[227] OCR Docket No. 07-80-5007, Investigative Report, March 15, 1982, p. 10.

[228] _Id_. at p. 11.

[229] The 94% male campus apparently had always been attended only by male students prior to the introduction of the cosmetology course, _id_. at 12, and the investigation revealed that in previous years brochures and course descriptions had been sexually stereotyped, _id_. at 22. The Guidelines provide that "[a] vocational education center, branch or annex, open to all students in a service area and predominantly enrolling minority students or students of one . . . sex, will be presumed unlawfully segregated if: . . . 2) it has since its construction been attended primarily by members of one . . . sex; or 3) most of its program offerings have traditionally been selected predominantly by members of one . . . sex." § IV.H; 44 Fed. Reg. at 17166.

[230] Investigative Report, at p. 12.

These examples are also illustrative of the differing approaches in the various regional offices and the failure of OCR's headquarters to establish a consistent approach to the various substantive aspects of the Guidelines. Perhaps the most glaring demonstration of this is the regional offices' approach to the Guidelines' provision that, "[i]f a vocational program disproportionately enrolls male or female students, minority or nonminority students, or handicapped students, recipients must take steps to insure that the disproportion does not result from unlawful discrimination in counseling activities."[233] Indeed, our examination of the investigative materials and Letters of Findings in this area convinces us that there is not even an effective quality control process with the regions themselves.

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[231] The amendments are attached to the Investigative Report furnished to us pursuant to a Freedom of Information Act request.

[232] This is hardly the only example of a proper finding in an Investigative Report which was ignored when a Letter of Findings was prepared. In OCR Docket No. 07-78-3038, Letter of Findings, February 5, 1979, the Investigative Report (at pp. 22-23, 25) concluded that the use of the GAT-B test in determining admissions to several medical technology programs was discriminatory, but there was no mention of the matter in the Letter of Findings.

For example, one region issued a Letter of Findings stating that there was a Title IX violation because a "district ha[d] failed to assure itself that the disproportionate enrollments of one sex in vocational courses at the high schools are not the result of discrimination on the basis of sex in counseling."[234] This was based upon "interviews with teachers and students [which] revealed that the district does not use specific counseling methods or procedures in the high schools to assure nondiscrimination in the enrollment of students in vocational courses."[235] Yet just several months before, the same regional office, investigating a complaint about continued patterns of traditional enrollment by sex in vocational classes, found no violation. The total enrollment of the school in question was nearly 50% female and it offered 23 vocational courses, nearly all of which had only token numbers of "non-traditional" students, in spite of a recruitment program designed to encourage nontraditional enrollment.[236] The documents we obtained suggest that a careful and searching examination of counseling practices was not undertaken, however,[237] and the regional office merely concluded, "[a]lthough there are courses that continue to have disproportionate number of male or female students, these enrollments are apparently the result of student choice."[238] Apparently no one in either the regional office or in OCR headquarters has been concerned with the possible inconsistency of approach in the two reviews.

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[233] Section V.B.; 44 Fed. Reg. at 17167.

[234] OCR Docket No. 04-77-0104, Letter of Findings, February 13, 1981, at p. 2.

[235] Docket No. 04-77-0104, Investigative Report, at p. 6.

Other regional office activity in this area ran the gamut from excellent and innovative to superficial and disappointing. For example, one region correctly (in our view) held a vocational school accountable for the discriminatory practices of a sending institution:

> Our review revealed that students are assigned to counselors on the basis of sex at . . . High School, . . . (an area sending school). Furthermore, the Center's vocational counselor was knowledgeable of this practice. The Center and the [vocational] District are required to assure that any educational entity which participates in any of their education

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[236] OCR Docket No. 04-80-1257, Statement of Findings, Oct. 24, 1980, at p. 1.

[237] For example, the regional investigator apparently saw no significant problem in the course enrollments, commenting that "all of the courses, except five . . . had both male and female participants," id. at p. 2.

[238] Id. at p. 1.

> programs or activities does not discriminate against any person on the basis of sex in the counseling or guidance of students. Therefore, the Center and the District have not met the requirements of . . . the Title IX regulations.[239]

Other regions had very different approaches to the matter. One review of a multi-jurisdiction vocational center with very low non-traditional enrollment apparently did not include any examination of practices at sending schools; instead, OCR personnel looked at 27 folders of students enrolled in programs non-traditional for the respective sexes, found that they had all been enrolled in the courses they selected as their first choices, and concluded there was no steering along traditional paths by the vocational consortium.[240] In another case, OCR itself found that "feeder school guidance counselors were not supportive of females applying to [the vocational school], in general, and to non-traditional courses in particular"[241] but ignored the problem in its Letter of Findings.[242] Other reviews seemed to focus on whether there was a deliberate policy of steering rather than upon the affirmative language[243] of the Guidelines.[244]

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[239] OCR Docket No. 07-78-3038, Letter of Findings, February 5, 1979, at p. 3.

[240] OCR Docket No. 02-82-5001, Investigative Report (undated), at p. 23.

[241] OCR Docket No. 01-79-5029, Investigative Report, March 30, 1981, at p. 6.

[242] The vocational school itself made non-traditional recruitment efforts but this is independent of feeder school practices which may well have impeded those efforts.

[243] _See_ text _supra_ at note 233.

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[244] One Investigative Report stated:

> As the charts exemplify, male enrollment is predominant in traditional male vocational study; female enrollment is predominant in traditional female vocational study. Based on an analysis of available information, no information analyzed disclosed that there was any *local attempt to place individuals in traditional vocational courses*. Advertising is directed toward stimulating the interest of both sexes into all vocational fields. Admission into classes is based on the individual interests of the applicants themselves. [emphasis added.]

OCR Docket No. 06-79-5019, Investigative Report, Sept. 12, 1979, at p. 24. The school under examination had a total enrollment in 1978-79 which was 42.4% female. Of twelve courses offered, six were 100% male, two were more than 95% male, one was all-female and two were more than 90% female.

The same regional office concluded, in another review, that "[a]lthough the information indicated under-representation by females in agriculture and in trade/technical programs, there was no evidence that the District prohibited female students from participating in all of its programs." OCR Docket No. 06-82-5003, Investigative Report, April 30, 1982, at p. 11. This investigation was also flawed by inappropriate data analysis; enrollment patters were examined only within major program areas (agriculture, distributive education, office occupations, trade-technical) rather than by individual courses. This approach tends to mask and submerge traditional enrollment patterns, since, for example, cosmetology is often the only trade and industry course in which there is significant female enrollment, and horticulture frequently will enroll most of the females in the agriculture grouping.

In the original investigative report (consistent with the Letter of Findings ultimately issued) concerning one institution discussed above (*see supra*, text at nn. 227-32), the regional office Equal Opportunity Specialist wrote: "A review of counseling and admissions requirements, which will come later in this report, did not provide any information that would indicate that the districts have *promoted or encouraged* the underavailability of females enrolled at the West Campus." (OCR Docket No. 07-80-5007, Investigative Report, March 15, 1982, at p. 11.)

There is no indication in any of the materials we looked at or from any of the interviews we conducted that OCR has attempted systematically to evaluate the quality of its own compliance reviews and complaint investigations in vocational education in order to assure consistency or comprehensiveness. There has certainly been no effort to establish a program of pilot reviews to develop investigative techniques and substantive analyses of fact patterns in some of the difficult or technical areas covered by the guidelines, such as funding and site selection or service areas.[245] As a result, while there have been some very useful and beneficial compliance or enforcement activities in various regional offices since the Guidelines were promulgated in 1979, institutionally OCR has not benefited from these positive experiences. Moreover, there have been an equal or greater number of instances in which regional offices have failed to conduct proper and credible enforcement action, and these have remained unobserved and uncorrected by Washington. As in the case of the regional office review of state MOA performance, each region has been left almost completely to its own devices. Without guidance or reinforcement from some central knowledgeable locus within the agency, inadequate enforcement of federal civil rights laws affecting vocational education continues and the regional offices continue to be deprived of the training, advice and consultation which they need in order to be of assistance to state personnel seeking to implement their MOAs.

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[245] Indeed, OCR recently has made decisions which will impede, rather than facilitate, a pilot review program. In the past, the results of the 1979 OCR-conducted survey of vocational education institutions has been used to target (select) school districts and other institutions for compliance reviews. However, in 1984 Assistant Secretary Singleton has determined that a new survey to be conducted will be "a stratified random sample by size and type of institution, and specific programs within institutions" whose purpose "is to determine, from a national perspective, the status of civil rights in vocational institutions" and "not the targeting of specific institutions for compliance review." Memorandum from Harry M. Singleton to "ADCS," January 11, 1984. (It has never been considered the mission of the Office for Civil Rights to collect data to assess the status of participation in educational programs, apart from its compliance function; this task is usually undertaken by the National Center for Education Statistics.) Without current and relevant data from the universe of vocational training providers, OCR will have difficulty in conducting an adequate pilot review program.

Chapter 9. The States

SUMMARY: Five years after the Guidelines were issued, one cannot characterize state MOA implementation as effective. Although a small number of states have established functioning and largely effective programs, another small group may be considered to have no real enforcement process at all. Most states fall in the middle, with a variety of problems in their MOA programs which have not been adequately addressed by federal monitoring and oversight.

Based primarily upon the annual reports which the states have submitted to the Department of Education, a number of common deficiencies can be identified:

(1) Some jurisdictions have been beset by considerable turnover in staff assigned to work on the MOAs. Particularly where no full-time assignments to MOA implementation have been made, or where placement of the function within the state structure has been altered during the past five years, this has impeded effective functioning.

(2) Many states have difficulty securing and analyzing the data necessary to conduct agency-level reviews; information about handicapped students is particularly lacking. Both major federal data sources -- the 1979 OCR survey of vocational institutions and the annual program data collection required under the Vocational Education Act -- have disadvantages for use in the MOA programs. Although states have developed a wide variety of methodologies for analyzing the data, OCR has not attempted to assess them in a systematic way.

(3) The examination of statewide policies and practices for discriminatory impact has not been completed in most jurisdictions. Especially lacking have been analyses of the distribution of state funds for vocational training and careful attention to admissions criteria and site selection.

(4) In a number of states there appears to have been little or no activity affecting post-secondary institutions, and this is true whether or not the same state agency has MOA responsibility for post-secondary as well as secondary subrecipients.

(5) Similarly, not all states have paid adequate attention to state-operated facilities and programs.

(6) Only a few jurisdictions have included proprietary institutions within their subrecipient pool and conducted desk audits and on-site reviews. These are important providers of vocational training which often receive federal funds through state agencies.

(7) The states, in general, do not examine admissions criteria affecting entrance into schools or programs with sufficient care, and often demonstrate the same confusion about the validation requirements for these criteria as have some OCR regional offices. The annual reports do not establish that states have consistently required adequate remedial steps from subrecipients when they do take up these matters.

(8) A number of states have assigned important roles in their MOA process to their Vocational Education Act sex equity coordinators, even though the statute requires these employees (funded by a special "set-aside" in the law) to work full-time on other functions. Neither OVAE nor OCR has dealt with this issue despite their knowledge that it is occurring.

(9) A large number of jurisdictions has altered the method of selecting subrecipients for agency-level review from the requirements of the MOP -- especially to coincide with the schedule of program evaluations under the VEA. In at least one instance, this seems to have resulted in completely submerging civil rights concerns when on-site reviews are conducted.

(10) Many compliance plans are too general or do not properly address the concerns identified in on-site reviews, but few states have insisted upon resubmission of plans.

(11) The states particularly need assistance and information about what other jurisdictions are doing with respect to vocational enrollments traditional for students of one sex or the other; too often, remedial plans have been accepted which merely represent that a subrecipient will "study" the problem or "continue efforts" to encourage nontraditional enrollment.

(12) The first five-year cycle of reviews has dealt overwhelmingly with procedural deficiencies (such as failure to appoint necessary grievance officers, publish notices, etc.) and accessibility issues for handicapped students. More complex questions

> such as funding patterns and program locations remain to be addressed in the future.
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> (13) Too many annual reports do not meet the requirements of the MOP and fail to provide enough information to permit the Department of Education to make a sound judgment about the quality of state MOA implementation.
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> There are signs that the MOA process _can_ work. In the states which appear to be most successful to date, a number of typical characteristics can be identified: (a) strong support for the process within the state education hierarchy; (b) committed, aggressive but tactful staff assigned to these tasks; (c) a financial commitment to the process. There are a number of important and innovative measures which various states have developed that need to be disseminated across the country by OCR, to improve the chances that other states will increase the quality of their own efforts.
>
> Thus, the key to giving the MOA experiment a "satisfactory" rating is guidance and leadership from OCR which will bring the average level of performance up to the standards of those states which currently are at the top of the roster.

As this report is being prepared for release in the spring of 1984, it is nearly five years since publication of the Guidelines and issuance of the Memorandum of Procedures.[246] Had the MOA process been carried out in accordance with its original design (and with adequate support from the federal government), we would be approaching completion of the first cycle of reviews by state agencies. By the end of that first cycle, all subrecipients in each state would have received a desk audit, during which state education officials would have examined enrollments and other statistics along with additional available written documentation. At least 5% of these subrecipients would have received a closer examination through the procedure of an on-site review in instances where the desk audit produced indications of potential compliance problems. As a result of this process -- supported by the states' provision of ongoing technical assistance to subrecipient school districts and institutions, and aid to the states by OCR -- thousands of vocational education providers would have begun to address the serious and lingering problems of discrimination, bias and stereotyping which continue to limit the opportunities of minority students, women and the handicapped. Real changes in curriculum, scheduling practices, and guidance, counselling and job placement procedures might have commenced. Indeed, one might confidently have hoped in 1979 that by the completion of the initial review cycle, limited but dramatic changes in vocational education enrollment and staffing patterns would have occurred.

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[246] _See supra_ pp. 15-23.

Unfortunately but rather obviously, these expectations have not been fulfilled. Neither the process nor the outcome goals of the Guidelines and the Memorandum of Procedures have been realized. As the preceding chapters of this report demonstrate, this failure can be attributed in some significant measure to the lack of appropriate assistance and oversight from the Office for Civil Rights. In this final section of the study, we attempt to provide an overview of what the states have and have not accomplished, because of or in spite of

OCR's efforts, during the first five years of the MOA program. Only by facing up to the limited success of the effort to date, we would suggest, can the federal government evaluate the future demands upon its resources to make the process work properly. Only by candidly assessing the weaknesses, as well as the strengths, of what OCR and the states have thus far accomplished, can one hope to fashion a credible proposal for further involvement of the states (both within and outside the area of vocational education) in the enforcement of federal civil rights laws.

One is driven to the conclusion that, taken as a whole, the states have not yet established a functioning, effective civil rights review process in vocational education.[247] In

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[247] Our evaluation of state progress is based primarily upon study of the 1983 annual reports submitted to the Department of Education, along with previous reports from a dozen states, review of the MOA correspondence and memoranda of contacts between OCR and the states, and a very limited number of visits to state agencies. Any detailed conclusions we might draw with respect to any particular states must thus be tentative. However, we have determined for two reasons that the judgments we make for the purposes of this report are adequately supported.

First, the data fall into clearly delineated patterns. There is a small number of states whose performance is relatively good. There is, similarly, a small number of states whose efforts are either nonexistent, token, or nonproductive. The remainder fall into a somewhat undifferentiated middle group having specific, rather than overall, weaknesses and failings. In general, states with a strongly established tradition of local control and a correspondingly weak state agency role have had difficulty in locating adequate resources for MOA work and in persuading subrecipients that the state is serious about remedial efforts; these states tend to be

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many jurisdictions, the initial desk audits and on-site reviews

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among those which have achieved the least progress in meeting the requirements of the Guidelines and the MOP. Wyoming, for instance, reported to the Department of Education in 1983 that

> The Wyoming State Department of Education, Vocational Programs Unit (VPU) is . . . still experiencing problems in fully implementing the MOA compliance letter and our annual work plan . . . . We feel that by December, 1983, the VPU will be totally operational. The problems that remain are three-fold: First, lack of manpower to fully and correctly carry out the MOA; Second, the lack of trained manpower to effectively balance our role in the state between federal compliance and local control, and; Third, limited information and data to carry out the equity ratings and agency level desk audits.

Second, our judgments about the status and quality of MOA implementation in specific states were confirmed in our discussions with OCR regional office personnel and are, for the most part, similar (though more sharply drawn and flatly stated) to the very general assessment provided to Assistant Secretary Singleton, *see supra* pp. 89-94.

There may be a few instances in which state MOA implementation is in fact better than our estimates but this is not reflected in the written documentation required under the MOP which we examined. For example, some states -- among them Florida, Illinois, Alabama, Indiana, Massachusetts, New Mexico and Oklahoma -- failed to include with their annual reports either (a) copies of the letters to subrecipients detailing on-site review findings; (b) appropriately detailed (in our view) summaries of the findings, or (c) copies of the voluntary compliance plans thereafter submitted by subrecipients. The absence of these data make it very difficult to form a secure assessment of the substantive quality of state activities. Some annual reports provide no evidence whatsoever upon which to base a conclusion that there is a functioning MOA program. (The District of Columbia and Vermont 1983 reports are examples.)

It is also conceivable that we overestimate the degree to which some states' MOAs have been effectively implemented, but this is likely only if the letters of findings from on-site reviews, the voluntary compliance plans, and other paper documentation submitted with the annual reports amount to a virtual

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were so superficial that major compliance issues were never identified or dealt with, and any significant benefits from the MOAs must await the second five-year cycle. These states are, however, ahead of a smaller group in which there has been virtually no compliance activity at all during the past five years. For example, the research for this report revealed that from 1979 through the spring of 1983, at least, the California State Department of Education (which had submitted an MOA covering California's secondary-level subrecipients) had not undertaken a single desk-level or on-site review, and that OCR had failed to take enforcement action.[248] In

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sham. This does not guarantee that compliance plans are being implemented -- a determination which the states are to make as part of their monitoring responsibilities -- or that they are producing meaningful change. It signifies that, if our assessments are correct, these states appear to be making the effort required of them by Section II of the Guidelines and by the MOP.

[248] On January 11, 1984 the Federal Education Project of the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, Inc., the Mexican-American Legal Defense and Education Fund, and Equal Rights Advocates, Inc., filed a formal complaint with the Office for Civil Rights about California's noncompliance. That complaint covered not only the State Department of Education but also the Chancellor's Office of California Community Colleges, which is the MOA agency responsible for post-secondary vocational programs in California. (The Chancellor's Office had been the subject of an earlier complaint to OCR by the LDF, MALDEF and ERA about continued discrimination in apprenticeship training programs. It was resolved by a promise from the Chancellor's Office to carry out the MOA vigorously. The complaint filed in 1984 charged that the Chancellor's Office had failed to carry out the enforcement activities which it had promised OCR that it would undertake in 1982-83.)

On February 2, 1984, Assistant Secretary Singleton wrote to us that, while the complaint was being referred formally

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other states which must be ranked at the bottom in terms of performance, some reviews had been undertaken, but the level of knowledge and competence on the part of state officials simply seems to have been so inadequate that no meaningful enforcement activity can be said to have occurred.[249] It is easy to say that there has been some improvement in nearly every state, especially since first-year performance was so unsatisfactory, but the fact remains that as one approaches the five-year mark there is no effective national civil rights

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to the regional office for investigation and resolution, OCR had concluded that there were serious deficiencies in California's execution of its MOAs. Although final resolution of the 1984 complaint has not yet been formalized as to both state agencies (OCR is negotiating and preparing "violation-corrected" LOFs, see supra pp. 105-06 & n.164), the regional office has notified us that both the State Department of Education and the Chancellor's Office have begun to carry out MOA activities in 1983-84. (The relevant correspondence in connection with this complaint is attached as Appendix G.)

[249] Typically in these states, statistical information which was available indicated the possibility of discriminatory practices by subrecipients; state MOA personnel recognized these problems but did not follow up on them. In other cases, state officials appear to have lacked an adequate grasp of the substantive provisions of the Guidelines and simply failed to see potential discrimination in both desk audits and on-site reviews. Since most state education agencies had not previously been responsible for nondiscrimination, nearly every state has gone through a long and sometimes arduous self-education process while it tried to put an effective MOA implementation plan into effect. (At one OCR regional office, the staff commented to us that it takes the federal government, which has access to greater resources and expertise than do the states, several years to train its own Equal Opportunity Specialists, in a setting which presumably is more supportive than in the states. So the minimal amounts of direct training provided since 1979 by the Department to state personnel could hardly have been expected to be adequate.)

program in vocational education. We summarize below some of the more common problems in state MOA implementation:

1. Turnover. The best record has been made in those states where the same group of individuals has been associated with the MOA process for the longest periods of time. In states which previously had equal opportunity or civil rights divisions of some kind to which MOA responsibility was assigned, stability of personnel was most easily achieved, and that stability allowed the states to increase their knowledge and expertise each year. On the other hand, in some states, such as Kentucky and Wisconsin, placement of the MOA function within the departmental structure had to be shifted after a year or two, with obvious effects upon performance. Especially in those states which did not assign a full-time employee to supervise the MOA process, year-to-year turnover impeded the smooth functioning of the enforcement program. For example, the 1983 annual report for Virginia, a state whose compliance efforts are woefully inadequate, says:

> In lieu of our accomplishments, inconsistent staffing patterns and organizational problems have hampered our efforts since 1980. Plans are underway however to reorganize the vocational compliance efforts of the Virginia Department of Education. Those plans include the following:
>
> 1) Selection of a fulltime compliance supervisor . . .
>
> 3) The development of a functional compliance procedure based on field observations.

It would not be surprising to find that less than half the state personnel who received CRC or ACCD training in 1980 or 1982 are still associated with the MOA process in their respective jurisdictions.

2. Data-Handling Capabilities. Many states, especially in the early years of the program, were not adequately prepared to produce and analyze data about vocational training. The sources of data available to them have serious limitations. The 1979 OCR Vocational Education Survey results were often incomplete and were identified only by school facility rather than administrative subrecipient.[250] VEDS data[251] were pro-

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[250] The survey forms did provide space for the identification of school systems from which a secondary vocational facility's enrollment is drawn, thus covering both area vo-tech schools and schools operated by a single district. However, the computer print-outs generated from the survey did not include this information, much less aggregate it by subrecipient. Even when an OCR regional office requested that the survey data be presented in a different format to better serve the purposes of analysis and evaluation, this was determined to be impossible. See Note to Frederick T. Cioffi, Director, Elementary and Secondary Education, Litigation, Enforcement & Policy Service, OCR, from Anne Dooley, Chief, Surveys & Analysis Branch, Analysis & Evaluation Division, Planning & Compliance Operations Service, OCR, March 11, 1982.

[251] The 1976 Vocational Education Amendments required the establishment of a

> national vocational education data reporting and accounting system . . . . including . . . information on vocational-- (A) students (including information on their race and sex), (b) programs, ...

20 U.S.C. § 2391. The Vocational Education Data System (VEDS) collects a variety of information about participation in voc ed "programs" (a "planned sequence of courses . . . designed to meet a specific vocational objective," see supra pp. 53-54) receiving funds under the federal Vocational Education Act and participation in work-study, cooperative and apprenticeship

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vided to the state for aggregation into the report sent to the Department of Education, but sometimes the bureau or division responsible for this task was not involved in MOA execution and data for each subrecipient were difficult to secure.

States have had a particular problem obtaining accurate data concerning handicapped students for use in selecting subrecipients for agency-level review as, for example, North Dakota reported in 1983. States with large numbers of subrecipients found it difficult to deal with the voluminous data (Wisconsin did no desk audits in 1983 because of data problems) and were unable to obtain useable computer programs from OCR. (In fact, OCR regional offices now recognize that many states have more sophisticated computerized analytical capabilities than the federal agency, which could benefit from their expertise.) The states tend to look to OCR for guidance in measuring disproportions indicative of possible discrimination (for example, enrollments more than 80% or 90% one-sex, etc.) while the federal government -- anxious to avoid any suggestion that it is establishing "quotas" -- has refused to make any numerical recommendations. The Guidelines and MOP require on-site investigation of subrecipients identified as most likely to have potential violations based upon the desk audit, which is principally a statistical review. Implicitly, then,

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programs, by 6-digit or 2-digit code (see supra note 70). The data are aggregated at the state level for reporting to the federal government.

the states are encouraged to develop a matrix combining the various statistical arrays (enrollment by race, sex, handicap and program; employment by race, sex and handicap, etc.). (Some states have one which can be expressed as a single score.) The variety of different schemes which have been developed for this purpose is almost staggering; to our knowledge, OCR has not attempted to evaluate them.

3. *Examination of state policies*. The Guidelines and MOP require the states to analyze their own policies and procedures affecting vocational training to insure that they are nondiscriminatory. Particularly important in this examination are state practices respecting the distribution of vocational education funds (federal, state and local), criteria for location of new facilities or the renovation or remodeling of older facilities, availability of curricula, and prerequisites for admission to courses or institutions. All of the MOAs accepted by the Department of Education contained commitments that a searching review of state practices affecting vocational training would be conducted, but there is probably no area in which state performance has been less satisfactory. Most states merely examined their written statutes and regulations to insure that they were gender-neutral, or that funding formulas did not incorporate distribution factors explicitly linked to race or sex. Indeed, it appears from the MOAs and the annual reports which we examined that most of the states looked only at their formulas for intrastate distribution

of federal VEA funds[252] and skipped over the question how the state's own aid to vocational programs was allocated, or what limitations (if any) state law or practice placed upon the use of locally raised revenues for programs.

Where the subject of funding was examined at all, it was generally through a facial analysis of formulas rather than an empirical consideration of their actual impact upon districts or institutions serving identifiable concentrations of minority or handicapped students. Similarly, we found only one state in which the required self-examination led to a modification of the state's practices regarding the definition or alteration of service areas for vocational-technical schools. (In that instance, the state began to consider racial impact explicitly and denied, at least temporarily, permission to make changes in service areas which would aggravate differences in the racial composition of adjacent area facilities.)

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[252] Washington's 1983 annual report, for instance, declared that "[a] complete analysis of the distribution of funds was completed" during the year, but the supporting documents revealed that only federal funds allocation was examined. The same thing occurred in Alabama.

Virginia did not go even this far; it reported:

> The MOA office concentrated its compliance efforts primarily in the areas of on-site review and technical assistance.
>
> Due to our limited time with the project, we could not focus on reviewing the State policy or funding formulas, however, adequate consideration will be given to this during the 1983-84 fiscal year.

Because of their immense political significance, the subjects of funding formulas and site selection may be too controversial to expect the states to handle;[253] it is certainly true that these subjects rarely surfaced as considerations in the desk audits or on-site reviews of subrecipients. These matters appear to be areas in which OCR must take the lead in establishing compliance standards and enforcement criteria through pilot reviews.

Most of the states did a better job in reviewing their own employment criteria for positions within the state departments of education; pregnancy leave policies were among the most frequently cited changes made as a result of the MOA policy review, along with the elimination of inquiries about marital status and physical conditions from employment applications, etc.

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[253] An illustration of the difficulty is provided in the 1983 West Virginia report. The state agency sought to explain away any possible racial problems, notifying one county:

> [This] High School would be considered racially identifiable, however, this is due to historical living patterns within . . . County.

Those rare instances in which state agencies (as in New York and Ohio) challenged school districts' location of vocational programs at racially impacted sites resulted in vociferous, if not vituperative, reactions from local systems. The Texas experience may be more typical. There, an on-site review team apparently concluded that a vocational school site led to segregation, reporting that:

> The site location of the . . . High School vocational education facility results in the denial of access to persons on the basis of race, color, or national origin.

After the school district had responded to the finding, it was withdrawn because the state agency itself had (perhaps mistakenly) previously approved the location:

> This discrepancy rescinded: the plans for the High School and Annex had been approved by TEA [the state agency] two years before the monitoring visit, and had then been approved as being in compliance with Title VI.

4. Post-secondary programs. The Guidelines and MOP appear to have contemplated that a single state agency would carry out all MOA responsibilities.[254] In at least half the states, this appears to be the case. However, in many states the administration of vocational programs at the post-secondary level is completely separated from secondary school district oversight, and a substantial number of states submitted two separate MOAs: one from the agency with responsibility for secondary programs and the other from the agency in charge of post-secondary matters.[255] The Department of Education accepted these dual MOAs and has thus been required to evaluate the performance of more state entities than it had planned.

In general, implementation at the post-secondary level has lagged substantially behind the rest of the process. This is as true for states which handle all subrecipients through one MOA[256] as it is for those in which the responsibility is divided. In fact, for some states in which a separate agency is responsible for post-secondary compliance, such as Arkansas, Rhode Island and New Jersey, there were no 1983 reports filed for the post-secondary level and the extent of compliance with the Guidelines and MOP is questionable.[257]

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[254] See supra note 32.

[255] This was the case in California, for example; see supra note 248.

[256] Virginia, for instance, did no desk audits or on-site reviews of post-secondary institutions in 1983.

The internal report to Assistant Secretary Singleton did not deal explicitly with the disparities between the secondary and post-secondary levels, but this is a subject which demands OCR's immediate attention. In light of the rapid development of community and junior college vocational training programs and the greater tendency of post-secondary institutions to have explicit admissions requirements, establishing an effective post-secondary MOA mechanism in each state should be a priority task for OCR in the near future.

5. State institutions. The Guidelines and the MOP require that state-operated institutions, whether they are area vocational-technical facilities, special schools (such as those for the blind, deaf, or orthopedically handicapped), or special facilities (homes for the neglected or delinquent, or prisons), should be included in the universe of subrecipients if they offer vocational training programs. Although every state recognized this obligation when it prepared its

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[257] On the other hand, some state post-secondary agencies appear to be more effective in implementing the MOA process than their elementary-secondary counterparts. Washington is an example.

MOA for submission to the Department of Education, the annual reports indicate much greater confusion about their coverage. Not all of the states place these institutions within the pool of other subrecipients for desk audit in the five-year cycle -- and not all of those which do not do so have made alternative arrangements to review programs at these institutions. On the other hand, several OCR regional offices have made visits to these institutions and discovered civil rights problems.

6. Proprietary institutions. Many, but not all, of the states appear to be uncertain of their authority and responsibility to examine the civil rights compliance of proprietary institutions which provide vocational training and receive federal financial assistance through the states.[258] As a result, only a few states have investigated the practices of these subrecipients, which contribute a substantial portion of vocational education services. Apparently OCR's regional offices are also confused about the scope of the Guidelines; staff at one office were surprised to hear that a state agency neighboring their region regularly included proprietary schools

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[258] Federal financial aid grants to students passed through state agencies, for example, would make proprietary vocational schools subrecipients for the purposes of the Guidelines. *See* *Grove City College v. Bell*, 52 U.S.L.W. 4283 (U.S. February 28, 1984). Although *Grove City* limits the prohibition of discrimination under Title IX in such instances to a school's financial aid office and program, legislation has been introduced in Congress to broaden the effect of receiving federal funds and to overturn this part of the *Grove City* decision.

in its MOA reviews, with good results; the region had been unable to advise one of its own states of the basis for extending its activities to include such institutions.

7. *Admissions requirements*. Course or program prerequisites and admissions requirements are an area handled poorly by nearly every state. Despite their widespread use, in many states numerous districts and schools were reviewed but not a single questionable admissions criterion was identified, while other states regularly noted and examined them. The states also exhibit the same confusion as do many OCR regional offices[259] about the appropriate standards to apply to the examination of these criteria, sometimes requiring validation without first determining whether or not there is a disproportionate adverse impact upon applicants or students in a protected class, sometimes permitting validation for "success" rather than insisting that prerequisites with a disproportionate racial or sexual impact, for example, be shown to be necessary for *participation*.[260] Whatever the standards which they articu-

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[259] *See supra* pp. 127-128.

[260] Sometimes it is difficult to tell just what a state is doing. Iowa's on-site review guide provides:

> If a particular requirement has a disparate impact on the numbers of specific group admitted, has there been a review done which determines if the requirement is directly related to success in the program . . . [w]here those standards have a disparate impact on one sex, a racial group, or the disabled, it

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late in letters of findings or correspondence, moreover, the states nearly uniformly accept corrective action plans which lack adequate detail to insure that unjustifiable requirements will be eliminated. For example, states which found admissions criteria with a disproportionate impact on women or minorities (GAT-B or other test scores, for instance) often accepted remediation plans in which subrecipients merely promised "to validate" the criteria, or "to examine" the prerequisites to assure that they were not discriminatory. Since the section on post-plan "monitoring" was the weakest part of every annual report, it was impossible for us to determine whether these apparent deficiencies were ameliorated to any substantial degree by follow-up monitoring on the part of the states.

8. Use of sex equity coordinators in the MOA process. A number of states have involved their VEA sex equity coordinators in the MOA process to an extent which is clearly inconsistent with the requirements of the law. The Vocational Education Amendments of 1976 included a strong emphasis on eliminating sex discrimination and required state agencies to employ at least one staff member to work full time in carrying out nine VEA-mandated functions to overcome sex discrim-

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> is important to show that the criteria utilized
> is directly related to success in the program.

However, as actually applied, it is not clear that this language is used to mean something other than successful participation in the course or program.

ination and stereotyping in state and local vocational education programs.[261] Congress provided a $50,000 set-aside out of states' basic VEA grants to support the salary and activities of the "sex equity coordinator."[262]

BOAE and OCR anticipated that some states would be tempted to give responsibility for administering the MOA program to their sex equity coordinators. The MOP forbade this as a violation of the VEA (since the law and regulations required the coordinator to work full time on the nine designated functions related to sex discrimination and stereotyping), but said that they could "perform coordinative activities with regard to their own statutory functions."[263] Over the years, a number of states have ignored this directive and the Act, and have combined the functions of the sex equity coordinators and MOA staff, but both OCR and OVAE have chosen to look the other way when violations have come to their attention.[264]

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[261] The functions include reviewing programs and policies for sex bias or discrimination, expanding institutions' awareness of the problem, and providing technical assistance in overcoming it.

[262] See 20 U.S.C. § 2304(b)(2).

[263] MOP, infra Appendix B, at 2.

[264] At a national conference in Washington in May, 1983, New Jersey sex equity coordinator Jacqueline Walker told OVAE Assistant Secretary Robert Worthington publicly that she was also serving as MOA coordinator. Asked by a member of the audience whether OVAE would take enforcement action against New Jersey and other states which were out of compliance, Worthington responded: "Education is a state responsibility.

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You can't tell a state superintendent what to do any more." LeRoy A. Cornelsen, Director of OVAE's Division of Vocational Education Services, told us that OVAE would not want to "upset a healthy relationship" with a state over an issue that "was not the kind of compliance problem that is important enough to put pressure on" (i.e., the VEA requirement that the sex equity coordinator work full time on sex equity). Cornelsen said his agency is sympathetic with the states' resource problems -- since some states have small staffs, "it is difficult for them to limit the sex equity coordinator's responsibility." Cornelsen said OVAE would not investigate a state based on "anecdotal" evidence and said the agency would render an opinion on the legality of a state's use of the sex equity coordinator only if the state agency itself asked for an opinion or if the sex equity coordinator reported that the state was out of compliance.

Had OVAE been interested in enforcing the law and MOP, it could have detected from the annual compliance reports of several states that they were disobeying the law. For example, Indiana's 1982 report, which OVAE reviewed, repeatedly identifies the State Coordinator for the Reduction of Sex Bias as the person in charge of the MOA civil rights compliance and technical assistance program. Nevada's annual reports, likewise, indicate that the sex equity coordinator plays a major role in implementing the Guidelines. On Utah's annual compliance report for 1983, the sex equity coordinator's name appears as author of the report and on sample correspondence notifying local education officials of impending reviews. The Utah Director of Vocational Education wrote to OVAE earlier this year inquiring whether the state's proposed restructuring of the sex equity coordinator's position, to allow her to spend half time "in three school districts on a variety of other responsibilities" (apparently unrelated to sex equity) would be a VEA violation. Cornelsen responded February 9, 1984 that the VEA regulations clarify Congress' intention that "the state have at least one professional working full time on the elimination of sex bias and sex stereotyping in vocational education." Cornelsen concluded that Utah's assignment of administrative functions to the sex equity coordinator would not be "in keeping with the intent of the law." The letter from Utah had not directly raised the question of whether the coordinator's serving as MOA staff was a violation, and Cornelsen told us that OVAE would not address that issue unless the state specifically asked.

OCR apparently has decided that, the MOP notwithstanding, it will not question the sex equity coordinator's role in the MOA process. Regional OCR officials in Atlanta acknowledged

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It is clear that when an agency chooses to place all of its civil rights and VEA sex equity responsibilities upon one individual, it is making a conscious decision not to expand its commitments to civil rights or to build up the enforcement capacity of its staff.[265] Moreover, it is obvious that one individual cannot effectively meet the requirements of the VEA while at the same time conducting an adequate civil rights enforcement program that includes investigation and remedy of race and handicap, as well as sex, discrimination.[266]

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that the Alabama sex equity coordinator was in charge of secondary MOAs but said they regarded it as a VEA, not OCR Guidelines, violation and would not take action.

[265] Several states acknowledged their sex equity coordinators' superior experience in civil rights compliance by promoting them to be administrators of the MOA program with supervisory responsibility over a new, full-time sex equity coordinator who was hired. We agree with an OCR Regional Director who said, in a memorandum to headquarters, that "generally, the Sex Equity Coordinators are . . . the strongest civil rights specialists on state staffs, are the most in touch with the issues, and are the most prepared for on-site review assignments." Memorandum from Gilbert D. Roman, Regional Director, OCR Region VIII, to Harry M. Singleton, September 28, 1982, at 3.

[266] The sex equity coordinators themselves differ on whether assuming civil rights enforcement responsibility enhances or detracts from their VEA-mandated role. Some fear that once they visit a school or school system as an MOA investigator and enforcer, they will not enjoy access to the institution later in their VEA role to provide aid in overcoming individual and institutional biases that affect enrollments. Others say the OCR Guidelines give them greater leverage than the VEA to change systems' discriminatory policies and practices. They also believe OCR has more credibility as a backup enforcement agency than OVAE. One sex equity coordinator who directs her state's secondary MOA program has maintained strongly that the MOA position has enhanced her effectiveness as sex equity coordinator. However, in 34 school systems and 94 schools reviewed on-site in her state in 1981-82 and 1982-83, only six per cent of the findings related to Title IX. There

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9. *Selection of subrecipients for review.* A number of states schedule on-site reviews to coincide with the cycle of program evaluations under the VEA, rather than on the basis of the results of the desk audits.[267] This is obviously contradictory to the Memorandum of Procedures and conflicts, at least in the early years of the MOA process, with the directive to reach those subrecipients with the greatest likelihood of serious compliance problems. Often, states did the minimum

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was not a single finding of sex discrimination or any evidence that the review teams had looked for substantive Title IX violations. Instead, a few procedural violations were noted and some districts with disproportionate male and female course enrollments were required to develop affirmative action plans to encourage nontraditional participation. The state's lack of scrutiny of school policies and practices which might be discouraging nontraditional enrollments made it unlikely that the schools would develop or enforce effective affirmative action plans. There was no evidence that the coordinator's administration of the MOA had increased her effectiveness as sex equity coordinator -- or improved the MOA's treatment of sex discrimination problems.

The merging of the sex equity and MOA functions has been justified in some states as a cost-cutting move (although the VEA provides earmarked support for the sex equity coordinator). One former coordinator who held both jobs simultaneously complained that when she was full-time sex equity coordinator, she had several staff members who assisted her. When the jobs were merged, her staff was taken away and she could not perform either job adequately. Her state eventually separated the jobs but left the MOA position unfilled.

[267] Among the states which take this approach are Delaware, West Virginia, Ohio, Utah and Texas. Alaska has eliminated desk reviews entirely; Louisiana has adopted a geographical approach for annual reviews; and North Dakota was told by an OCR Regional Office to depart from the MOP to ensure that the sample of subrecipients reviewed each year included a number of different types of vocational providers. Virginia, curiously (and apparently with OCR regional office approval), conducted on-site reviews of only selected schools offering vocational education within subrecipient school districts.

5% on-site reviews of the "worst" subrecipients identified in the desk audits each year, and despite their own conclusions in agency-level reviews that other subrecipients may have had serious problems, districts and institutions not within the "5%" were ignored or sent letters indicating that they were fully in compliance with civil rights requirements. (As we noted previously, *see supra* note 66, the Memorandum of Procedures actually encourages this approach, albeit unintentionally.)[268]

OCR regional offices should be aware of the pattern from studying the annual reports, but little attention seems to have been paid to the matter. Since the first five-year cycle of desk audits and on-site reviews will shortly be completed in most states,[269] OCR may wish to consider amending the Guidelines or the MOP to permit more coordination with the program evaluation cycle. However, it is important to insist upon rigorous compliance with the substantive portions of the Guidelines and the MOP: in at least one state (Delaware) which synchronized on-site reviews and program evaluations, we found that the civil rights part of the review had been completely submerged in the evaluation visit and there were no traces in the state's report of any concern with access or equity issues.

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[268] One example of this problem was in South Carolina, where the State Board for Technical and Comprehensive Education used a single scoring system combining several measurements of disproportionate enrollment. As a result, of four institutions given desk audits, only one was selected for an on-site review even though the "low" composite scoring institution enrolled more than 68 per cent of its women students in courses that were more than 90 per cent female. The only communication the schools which were not reviewed on-site received did not request compliance plans to address these problems. Instead, it merely advised them that "it would be advantageous for you to review the attached Title VI, IX, and Section 504 regulations to assure institutional compliance with these continuing civil rights requirements."

[269] In some states which did not undertake an effective enforcement program (like California), or which fell behind schedule, OCR has recently granted extensions of the five-year deadline for completion of desk-level reviews of all subrecipients.

10. *Adequacy of compliance plans*. A major weakness in almost every state is the inadequate level of detail and commitment required of subrecipient compliance plans. We have already remarked that many states accept a promise to "examine" a questioned admissions criterion or prerequisite. More generally, a large number of the states have focused most of their attention upon the investigation and findings stages; once they have drawn the attention of a subrecipient to a problem they are willing to accept a promise of good-faith efforts to eliminate the problem. Sometimes they do not get even that. In more than one state, we found a subrecipient had responded to a letter of findings from a state agency by continuing to disagree with one or more particular allegations, and without any commitment to take the sort of action suggested by the state agency.[270] Nevertheless, the state

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[270] For example, West Virginia told one county:

[footnote continued on next page]

agencies made no further attempts to secure remediation actions in such situations. While this may represent the extreme, it was relatively common for state agencies to accept vaguely worded descriptions of what a local jurisdiction or institution would do to alleviate difficulties identified in a state review. The best corrective plans were obtained in those states which had developed standard formats requiring the subrecipient to identify, for each citation of potential noncompliance, the action to be taken, the person responsible for it, and the projected completion date. Some states, such as West Virginia, have allowed years to elapse without receiving compliance plans from subrecipients.

11. Traditional enrollment patterns. Many states failed to focus on the problems of subrecipients with program or course enrollment patterns traditional for students of a particular sex.[271] The Guidelines create a presumption that such

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> Presently, evaluative test and materials are not tailored to assess specific areas of vocational aptitude. Up-to-date evaluative test and materials should be acquired and utilized to assess needs. This would allow for proper placement of students.

The response was:

> Recommendation vague. GATB currently being used provides this information.

Although the GATB has been identified as discriminatory, see supra, text at n.209, the state took no further action.

[271] In Illinois, for instance, the state used a sophisticated, computer-generated formula to select those subrecipients which

[footnote continued on next page]

patterns result from discrimination if the school was constructed to serve only students of one sex, if course or program enrollments were formerly limited by sex, or if courses or programs have traditionally been taken only by students of one sex. In any event, where such patterns exist, the Guidelines require subrecipients to take affirmative action to ensure that they do not result from discriminatory actions

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would receive an on-site review. The formula incorporated a measure of the relative underrepresentation of minority groups, women and the handicapped in vocational education generally and in individual program areas specifically. Nevertheless, not a single subrecipient which received an on-site visit was found to be violating the Guidelines because it failed to take effective steps to ensure that these enrollment patterns did not result from bias in counselling, etc. On the other hand, 24 of the 37 subrecipients received "recommendations" that they "[t]ake additional steps to encourage the enrollment of males and females in vocational courses/programs considered nontraditional for their sex." The basis for the two-level process is not apparent, nor does the report indicate what specific steps school districts or institutions agreed to take in response to this "recommendation."

Arizona reported that "[t]he disproportionate enrollment analysis form was the key element in determining whether an on-site review was warranted" but found few violations in its reviews; this state also made several "recommendations" that subrecipients seek to increase nontraditional enrollments.

Somewhat similarly, Kansas reported that its desk audits showed, for example, that "9 broad-base industrial education programs had a secondary enrollment of 110 females and 773 males; two programs had no females enrolled and four had under 10%" but few on-site findings related directly to these enrollment patterns. Indeed, all "findings" of on-site reviews in the state were expressed in terms of 19 extremely general compliance standards which did not provide a basis for expecting adequately specific corrective action from subrecipients, such as: "The district provides guidance and placement services which do not result in discrimination of the target populations."

in areas such as counselling.[272] Nevertheless, most states appear quite hesitant in dealing with these matters. Often a finding that heavily sex-traditional enrollment patterns persist resulted only in a "recommendation," rather than a "requirement" that a subrecipient take action.[273] Even more frequently, whatever the language used by the state agency, subrecipient responses containing little more than generalities were accepted as adequate. (This was the case in, for example, Ohio, Michigan, Alabama and New Jersey.) Perhaps this is not surprising, since there is not a well-established technology for eliminating the effects of bias and stereotyping; however, a number of states did make important contributions in this area. For example, one state (Nebraska) persuaded nearly every school district that it reviewed (where traditional enrollment patterns occurred) to expand mandatory prevocational courses for male and female students (reversing the old "boys' industrial arts" and "girls' home economics" traditions) to help eliminate stereotyping. Another state (Michigan) has developed a series of very specific recommendations for actions which can be taken by subrecipients to deal with these problems, in a document which also includes a lengthy reference section listing outside agencies which can be contacted for assistance. Another (Colorado) attempts to get school districts and other subrecipients to establish specific numerical goals for nontraditional enrollment. In one state, a subrecipient completely revamped its guidance program covering the eighth to twelfth grades to emphasize sequential steps to encourage nontraditional enrollments. A mechanism for sharing this information would benefit all of the states and OCR.

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[272] Vocational Education Guidelines, §§ IV.H, V.B.; 44 Fed. Reg. at 17166, 17167.

[273] *See supra* note 271. It is the substance of what a state does, not the form, which is critical. Mississippi on-site review teams made findings and "recommendations," but the state's letters to subrecipients clearly delineated that responses to these "recommendations" were mandatory. Similarly, South Carolina made mandatory "recommendations" and optional "suggestions."

12. Emphasis on "procedural" problems. In most states during the first five-year cycle, most of the violations and problems noted have been "procedural," rather than "substantive." For example, subrecipients have most often been found not to have conducted a Title IX self-evaluation, or not to have appointed a grievance officer under Title IX or Section 504, or not to have published an adequate annual notice of nondiscrimination; numerous barriers and impediments to the physical accessibility of vocational facilities have been identified in on-site visits. (Examples of states in this category include Washington, Tennessee, Alabama and Missouri.) Some states, including Oregon and Arizona, simply report that there are few problems revealed by the reviews. Admissions criteria, funding patterns, equality of vocational offerings among facilities located near each other but in different jurisdictions -- these are the kinds of problems far less

frequently addressed.[274] Since the difficulties and omissions by subrecipients which have been identified during the first five-year cycle are real ones, and since the MOA process will soon begin a second cycle, OCR should concentrate on seeing that more complex deficiencies will soon be given adequate attention by the states. As we noted previously, this will require additional training and technical assistance from OCR.

13. Quality of annual reports. In far too many instances, state annual reports do not meet the requirements of the Memorandum of Procedures. In particular, without copies of the letters of findings issued by the state agencies (or a sufficiently detailed summary of them) and copies of the remediation plans accepted from subrecipients, it is virtually impossible to make a reasoned determination about the quality of MOA implementation. When OCR regional offices have dealt with this deficiency, they have usually been satisfied to obtain a commitment to a more detailed report in subsequent years rather than requiring resubmission of earlier reports. Thus,

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[274] For instance, in 1983 the Tennessee State Department of Education did an on-site review of the Memphis school system, which is 75% black in student enrollment and offers vocational training at 28 high schools and 7 vocational centers. Vocational enrollment is 55% female, 45% male; 77% black. There is a wide variation in the courses available at different sites, which also vary significantly in racial composition. Nevertheless, the preliminary letter of findings issued by the state included not a single mention of sex-traditional enrollment patterns or segregation.

for the initial years of MOA implementation by the states, OCR has little detailed documentation of what was actually accomplished.

Although the experience of the past five years has been far from uniformly successful, there are signs that the MOA process *can* work. A number of states (perhaps nearly a dozen)[275] can be said to have established a largely effective enforcement approach by investing considerable resources and effort into their MOA programs. In their first cycle of reviews, these states dealt with a broad range of issues and often pioneered innovative techniques which deserve to be studied and disseminated by OCR. It should be noted that these states exhibit considerable variation: not all are jurisdictions with a tradition of strong central control; not all are urban or industrial states; not all have large staffs assigned to the MOA process; not all are equally strong across all of the issues raised by the Guidelines. They do share a few characteristics: First, strong support for the MOA process from the state education hierarchy is evident. In many of these states, letters of findings are signed not by an MOA Director or Coordinator but by a high-level official in the education department, thus signalling state commitment to the process.[276] In one state (Maine), findings are presented to and approved by the State Board for Vocational Education. (Other states make this support and backing evident through different means.) Second, the individual in charge of the MOA process is committed, aggressive and talented at smoothing the ruffled feathers of school superintendents and college presidents. Third, each state has attempted to maintain an appropriate level of MOA activity in spite of budgetary and staff pressures. No federal aid has been made available explicitly to support the MOA effort, although states may choose to spend some of their VEA administration funds for this purpose. States in the group discussed here have not eliminated all MOA activity in the face of budget pressure, despite the fact that other jurisdictions have done so. (For example, the California State Department of Education reported annually to OCR that it had undertaken no secondary level MOA compliance activities because of "budget freezes.")

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[275] We have previously described the basis for our assessment of state performance (*see supra* note 247). Because of the limitations of our research and the fact that we could not conduct major field work, any attempt to create a listing of the "best" states can be only an approximation. Nevertheless, because states which have documented substantial efforts and results in their annual reports should be recognized, and with the reservation that the listing may not be entirely inclusive, we conclude that the following jurisdictions appear to be making real progress in their MOA implementation: Arkansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, New York, Ohio, and Pennsylvania. Other states, about which we are less certain (especially because some of their annual reports are incomplete), which appear to be partially successful include Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, New Hampshire and New Jersey.

To balance out the picture of the deficiencies that have appeared in many state MOA enforcement processes, it is only fair to mention some of the examples of worthy, even courageous, state actions which we noted in our research:

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[276] Examples are Minnesota and New Hampshire.

-- At least two states (New York and Ohio) have challenged major urban school districts over the location of special vocational programs on the sites of heavily minority high schools. In these cases, the school districts resisted the finding vigorously, and at least initially they refused to consider any remediative action. Thus far, the states have continued to press the districts to take effective steps to alter the racially segregated character of the vocational enrollment at the sites.

-- One state conducted a compliance review and interviewed a female student who charged that her shop instructor (in a class nontraditional for women) discouraged her interest in the subject and also subjected her to sexual harassment (patting and hugging). This is obviously a sensitive area for any administrator to deal with; however, the state took a very aggressive approach, strongly recommending to the subrecipient that disciplinary action be taken against the instructor and announcing pointedly that an on-site monitoring review would be conducted in the future to make certain that the problem had not recurred. Although the subrecipient denied that the harassment had occurred and attacked the credibility of the student, it nevertheless reported to the state that it had required the instructor to take five hours' in-service training on equity requirements and made it clear that such conduct would not in the future be tolerated.

-- A number of states have developed self-evaluation instruments based upon the Guidelines which subrecipients must complete and return either before a desk audit or before an on-site review. The self-evaluation provides important information to state agency personnel; it familiarizes subrecipients with the requirements of federal law and the Guidelines; and it often results in remedial action to correct obvious violations even before the state agency is involved.

-- One state requires all school districts and vocational-technical institutions to have written affirmative action plans with goals and timetables for minority and nontraditional student enrollment as well as employment. Remediative plans submitted to this state agency have included a number of innovative proposals for increasing nontraditional enrollment.

-- A number of states, including Michigan, send letters of findings to subrecipients who are not selected for on-site review after desk audit but which appear to have potential problems, especially in the area of minority and sex-traditional enrollment. These letters require the subrecipients to propose steps they will take to address the problems identified, just as in the case of subrecipients who are given an on-site examination.

-- One state has pressured a post-secondary vocational-technical institution to make itself more accessible to the minority population in a nearby urban center. No solution has yet been found after consultations with the city's public transportation authority but the state is continuing to press for an effective answer.

-- We noted above some of the actions which states have taken to deal with the problem of continuing traditional enrollments.[277]

In summary, the picture is an unsatisfactory one, if not entirely a bleak one. There have been enough instances of successful implementation to convince us that the experiment deserves at least a fair try. This would involve OCR's providing the guidance and leadership which is necessary to bring the average level of performance up to the standards of the current best states. With an appropriate commitment on the part of the federal government, perhaps it can be done.

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[277] *See supra* pp. 167-68.

Conclusions and Recommendations

Almost eight years ago, the NAACP Legal Defense and Educational Fund, Inc. assessed the federal government's efforts to comply with court orders regarding civil rights enforcement in vocational education:

> The reasons for the continued lack of attention [by OCR] to special purpose and vocational schools are not difficult to fathom. The response to Judge Pratt's Order requiring OCR to implement a compliance program for state-administered and operated schools has been characterized by inept management and failure to define compliance policies. This report all too clearly demonstrates the disastrous consequences of decentralizing responsibility to the Regional Offices without central administrative control and direction. No one within OCR's administrative hierarchy was given the responsibility of implementing a compliance effort for state-administered schools and coordinating and monitoring the work of the Regional Offices. The Policy and Program Development Branch began data collection, conducted Pilot Reviews, and developed a compliance manual for vocational schools, but its responsibility was limited to setting the groundwork for compliance activities. Without central direction and coordination, the Regional Offices have operated on an *ad hoc* basis with the concomitant ineffective, indeed, wasteful, use of staff resources and efforts. . . .
>
> The resource argument is often used by OCR to justify its inattention to areas of its various responsibilities. In part, OCR does have a resource problem. More staff is needed. But the problem is not just more people but better use of existing staff. Because of management deficiencies and lack of clearly understood compliance policies, OCR staff members who did on-site compliance reviews were not sure what they were looking for or what the scope of the review should be. They lacked guidance on what issues

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[278] P. McClure, *Title VI and Title IX Compliance by the Office for Civil Rights in State-Operated Special Purpose and Vocational Schools Pursuant to Adams v. Mathews* 72-74 (July, 1976).

> should be pursued or what documentation should be collected. Consequently, many reviews were exceedingly superficial, and compliance decisions were based on inadequate information. Once reviews had been done there was uncertainty and confusion in the Regional Offices as to what burden of proof OCR must sustain and what factual documentation was necessary in order to make a finding.
>
> In too many instances the Regional Offices chose the expedient course and found schools in compliance, or identified "concerns" which did not rise to the level of compliance problems. If staff members had known what they were doing in the first place, their time could have been much more wisely spent.
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> . . .
>
> [With respect to a]rea vocational schools . . . OCR has developed the semblance of a compliance program, but it has been crippled by the failure to promulgate official and clearly understood compliance policies and by an unwillingness to address systemic problems of discrimination in state-wide practices of fund distribution, hiring, admissions, job placement, and apprentice programs.
>
> . . .

Virtually the same criticisms could be made today of OCR's attempts to initiate and administer the state MOA program. While the conception which underlies Section II of the Guidelines may be a promising one, the agency has simply never carried out the management and programmatic steps necessary to make it work well.

As was true of OCR's limited involvement with vocational education a decade ago, no one with adequate knowledge and authority in the Washington headquarters office has ever been assigned (as that individual's major or sole task) the responsibility for superintending the MOA process. There has been no coordination and supervision of what the regional offices have been doing, either with respect to their own compliance reviews or complaint investigations of vocational facilities, or with respect to what the states in their geographic areas have done to carry out the MOAs they submitted.

The training which the federal government has made available to the states was too little and too late, a situation further complicated by the lack of adequate guidance for OCR's own staff, especially in the regions. OCR continues its historic reluctance to make policy decisions on the application of antidiscrimination statutes or the Vocational Education Guidelines which are then memorialized in writing and disseminated to its own staff and to recipients of federal funds.

Because there is no centralized review of what the regions are doing, inconsistent positions on questions which arise repeatedly in the course of OCR or state office compliance activities are simply ignored. Equally significant for state MOA efforts, there is no one within the Department of Education who has reviewed all of the MOAs, the state annual reports, or other documentation available and who is therefore in a position to identify and share with a wider audience the innovative ideas and successful approaches to civil rights enforcement and the elimination of discrimination, bias and stereotyping which are being attempted in a number of jurisdictions. And at the other end of the spectrum, even flagrant refusals or failures by state agencies to implement the MOAs they developed and submitted to the Department of Education in 1980 have gone unremedied by OCR.

In sum, the Department of Education has yet to demonstrate that it is truly committed to an effective partnership with the states in civil rights enforcement. As this report has sought to demonstrate, state enforcement of federal civil rights mandates cannot take place in the absence of effective information, guidance and training from the federal government, together with sufficient federal oversight to insure that the results are adequate. But the Department of Education (and its predecessor, the Department of HEW) have been unwilling to undertake, or to give appropriate priority to, the necessary federal guidance and oversight to make a federal-state partnership in civil rights work. Similarly, OCR itself has been unwilling to exert the necessary central oversight and control from headquarters to insure that the regional offices are provided with the training, information and guidance which they require to perform their roles in the MOA process -- or at least to give this work the priority it demands. State civil rights enforcement in education has the potential for increasing compliance with federal requirements but it is emphatically not a means of eliminating any and all federal presence or responsibility. Until federal authorities make their actions accord with their constitutional and statutory obligations, state civil rights enforcement in vocational education will remain a neglected stepchild.

Initiation of the MOA effort has significantly expanded the impact upon vocational education institutions and local school districts of civil rights concerns and requirements. However, while we are encouraged by what a small number of states have been able to do despite the absence of meaningful help from OCR, their achievement does not provide ample grounds for satisfaction about the experiment. Mostly satisfactory civil rights enforcement in less than 20% of the states[279] is not an acceptable result; what OCR must do through enforcement of the Guidelines and by providing assistance to the states is to attain fully satisfactory civil rights enforcement in all of the states. This will require substantial attention to this issue on the part of top OCR officials and a commitment of appropriate resources.

In his draft memorandum concerning the MOA process in the spring of 1983, OCR attorney Paul Chassey[280] made a number of specific recommendations for OCR action to make state activities more effective. His prescriptions are as valid today as they were when they were written. Chassey suggested:

> A. Include regional responsibility for MOA activity into RD performance appraisal system. [_See_, _e.g._, _supra_ note 183.]
>
> B. Include regional review of MOA activity into quality assurance sample. [_See_, _e.g._, _supra_ pp. 75-76, 138-39 & n.106.]

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[279] _See supra_ pp. 170-71.

[280] _See supra_ pp. 95-96.

C. Designate full-time coordinator of MOA activity at the headquarters level. [*See*, *e.g.*, *supra* pp. 27, 63, 89 & n.53.]

D. Convene an MOA task force to review MOA procedures and recommend needed changes. [*See supra* p. 97.]

E. OCR initiate a regional training program to ensure that regional staffs know

   1) their responsibilities; and

   2) how to perform their responsibilities. [*See supra* pp. 58-78.]

F. OCR develop a training package that can be given to a regional person who would, in turn, train state people in their responsibilities under the MOA. [*See*, *e.g.*, *supra* pp. 45-57.]

To our knowledge, only "D." has been specifically implemented, and we are unaware what recommendations, if any, the task force made and the extent to which there are plans to implement those recommendations. While Chassey's other recommendations are not, by themselves, sufficient to guarantee effective operation of the MOA program, they are certainly worthwhile steps: Supervision of the MOA activities of the states must become an important function of the OCR regional offices and the Regional Directors must be held personally and professionally responsible for performance by their staff; OCR headquarters must aggressively review the region's own compliance reviews and complaint investigations of vocational training facilities to develop policy, identify issues needing further clarification, and insure consistency of approach and result; a full-time, adequately high-level staff member within OCR headquarters should be given the necessary responsibility and authority to make decisions and eliminate impediments to more effective guidance and training to both the regions and the states; training and materials for both OCR's own personnel and state officials is a critical necessity.

These are all good suggestions. To carry them out will require a marked change of attitude on the part of the Department of Education and OCR. But that is an absolute necessity if the Department wishes to make the case for a greater state role in civil rights enforcement.

We would add the following recommendations to those made by Chassey, which we endorse:

1. The Congress should appropriate funds for distribution to the states to support staff positions to carry out the MOA. As the experience of the first five years demonstrates, staff at the state level can reach far more providers of vocational education through either desk-level or on-site reviews than can the OCR regional offices. The states, however, have been hampered by budgetary constraints and high turnover. We suggest that each state receive enough funds to support at least one full-time professional staff member and supporting personnel, and that additional funds be made available to states with large numbers of subrecipients.

2. OCR should immediately develop and fund effective and continuing training programs for both its own staff and for state personnel. At the same time, OCR should draw upon the experiences of the past five years and make appropriate modifications to the Memorandum of Procedures or the Guidelines. Current versions of all MOAs should then be reviewed in light of these standards and appropriate modifications required.

3. Specifically, the MOP should be amended to require that copies of all letters to subrecipients presenting the findings of state agency on-site reviews, and all compliance plans submitted by subrecipients, must accompany the annual reports sent to the Department. [*See supra* pp. 87-88.]

4. The Department should develop a model computer analysis program for use with OCR Vocational Education Survey, VEDS and other data. [*See supra* p. 150 & n.134.]

5. The Department should immediately publish an NPRM to amend the Title IX and Section 504 regulations to require submission and implementation of "Methods of Administration." [*See supra* pp. 64-67 & n.90.]

6. OCR must begin to enunciate and publish (for wide dissemination) its policies on issues arising in vocational education. [*See supra* note 200.] The states should not be expected to, and cannot, develop and determine policy authori-

tatively interpreting the meaning of federal antidiscrimination laws.

7. The Compliance Manual and Technical Assistance Handbook developed by ACCD should be immediately revised and updated; the OCR internal vocational education Investigative Manual should be put in final form and disseminated; and the proposed manual on funding issues [see supra p. 62] should be issued.

8. OCR should use its headquarters staff to plan pilot reviews to be conducted in coordination with the regional offices, in order to gain experience and develop policy on issues which states are unlikely to reach or deal effectively with through the MOAs. [See supra p. 123.] For example, OCR should do more compliance reviews on issues of vocational program location, school site selection, formulas for distribution of state resources to vocational programs, services to limitedEnglish-speaking students, and methods of validating admissions criteria. It should also develop the capacity to assess and compare the quality of vocational offerings made available by school systems, area vocational-technical schools, or post-secondary institutions in the same state. This will require that OCR conduct an adequate up-to-date survey (not a sampling) of vocational institutions for targeting purposes. [See supra note 245.] The results of these reviews should be regularly disseminated to the states and regional offices.

9. OCR headquarters should continuously review state MOA reports and other documents to identify issues needing clarification as they arise and to select remedial approaches or compliance steps which should be shared with other states and the OCR regions. A mechanism for accomplishing this should be developed and utilized -- along with an adequate Management Information System to permit headquarters to remain abreast of regional office activities in this area.

10. OCR should conduct on-site reviews of school districts or institutions which have been the subject of state agency investigations under their MOAs in order to verify the efficacy of state processes. [See supra pp. 102-03.]

11. The Department should assign adequate staff time and resources to the MOA effort. [See supra pp. 98-99 & n.150.]

12. The Department of Education should sponsor at least an annual conference bringing together state MOA personnel and OCR officials in charge of supervising the MOA process, for the purpose of sharing information and updating policy, etc. The Department and its predecessor used this method with considerable success in the Title I, ESEA program, as it currently does for migrant education and other endeavors.

13. OCR should return to the practice of issuing "violation-only" Letters of Findings at the conclusion of its complaint investigations or compliance reviews. [See supra pp. 105-06 & n.164.]

14. Finally, but essential to the success of all other efforts, OCR must act forcefully and promptly when states fail or refuse to accept their MOA responsibilities. For instance, OCR and the Department should immediately enforce the Vocational Education Act's requirement that state sex equity coordinators spend full-time on their statutory responsibilities, and require that states relying upon their participation in the MOA process cease this practice. [*See supra* pp. 158-61.] And OCR should devote particular attention to the implementation of post-secondary institution MOAs. [*See supra* pp. 154-55.]

APPENDIX A

[4110-12-M]

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

VOCATIONAL EDUCATION PROGRAMS

Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap

AGENCY: Office for Civil Rights, Department of Health, Education, and Welfare.

ACTION: Final Guidelines for Vocational Education Programs.

SUMMARY: These guidelines explain the civil rights responsibilities of recipients of Federal funds offering or administering vocational education programs. They derive from and provide guidance supplementary to Title VI of the Civil Rights Act of 1964 and the implementing departmental regulation (45 CFR Part 80), Title IX of the Education Amendments of 1972 and the implementing departmental regulation (45 CFR Part 86), and Section 504 of the Rehabilitation Act of 1973 and the implementing departmental regulation (45 CFR Part 84).

EFFECTIVE DATE: March 15, 1979.

FOR FURTHER INFORMATION CONTACT:

David Gerard, Office of Standards, Policy, and Research, Department of Health, Education and Welfare, Office for Civil Rights, 330 Independence Avenue, S.W., Washington, D.C. 20201 (telephone 202-245-9177).

SUPPLEMENTARY INFORMATION: The following Guidelines explain how civil rights laws and Department regulations apply to vocational education programs. They are issued as a result of injunctive orders entered by the United States District Court for the District of Columbia in *Adams* v. *Califano*. They are also issued because the Department has found evidence of continuing unlawful discrimination in vocational education programs.

A. LEGAL BASIS FOR THE GUIDELINES

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in any program or activity receiving Federal financial assistance. The Department of Health, Education, and Welfare issued regulations implementing Title VI in 1965. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs receiving or benefiting from Federal financial assistance. The Department issued regulations implementing Title IX in 1975. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap in any program or activity receiving Federal financial assistance. The Department issued regulations implementing Section 504 in 1977. These civil rights statutes and their implementing regulations apply to vocational education programs.

In 1973, the Department of Health, Education, and Welfare was sued for its failure to enforce Title VI in a number of education areas, including vocational education (*Adams* v. *Califano*). As a result of this litigation, the Department was directed to enforce civil rights requirements in vocational education programs through compliance reviews, a survey of enrollments and related data, and the issuance of guidelines explaining the application of Title VI regulations to vocational education. The Guidelines that follow are issued to meet a requirement of the *Adams* court orders.

B. FACTUAL BASIS FOR THE GUIDELINES

The Guidelines are also adopted because it is apparent that many vocational education administrators engage in unlawfully discriminatory practices. They need additional guidance and support from the Department to meet their obligations under civil rights authorities.

Information provided by the Office of Education's Bureau of Occupational and Adult Education for 1976 and 1977 reveals that male and female students are concentrated in programs traditionally identified as intended for them:

	Percent of total enrollment			
	1976		1977	
	Male	Female	Male	Female
Health occupations	21.2	78.8	21.2	78.8
Occupational home economics	15.3	84.7	16.1	83.9
Consumer and homemaking	16.8	83.2	18.4	81.6
Office occupations	24.9	75.1	24.9	75.1
Technical	88.7	11.3	83.0	17.0

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	Percent of total enrollment			
	1976		1977	
	Male	Female	Male	Female
Trade and industrial	87.3	12.7	85.6	14.4
Vocational agriculture	88.7	11.3	85.2	14.8

In recent years vocational education administrators have addressed unlawful discrimination in their programs. Generally, they have taken advantage of the affirmative action provisions of the Vocational Education Amendments of 1976. Administrative procedures to implement these provisions are in place and are contributing to equal opportunity. Thus the above chart suggests that between 1976 and 1977, female participation increased in technical, trade and industrial, and vocational agriculture programs. There was also an increase in male participation in Consumer and Homemaking programs and Occupational Home Economics programs.

Current information on the enrollment of handicapped and minority students in specific vocational programs is not available. This deficiency will be corrected through the Office for Civil Rights Vocational Education Survey of 1979 and the Vocational Education Data System (VEDS) required by the Vocational Education Amendments of 1976. However, compliance reviews conducted by OCR investigative staff from 1973 to 1978 consistently found civil rights violations in vocational schools. For example:

1. Eligibility requirements such as residence within a geographic area or admissions tests deny vocational education opportunities on the basis of race, color, national origin and handicap;
2. Handicapped students are impermissibly assigned to separate annexes or branches; they are also denied equal vocational education opportunities as a result of inaccessible facilities and inadequate evaluation procedures;
3. Vocational schools established for students of one race, national origin or sex continue as essentially segregated facilities;
4. National origin minorities with limited proficiency in English are denied equal opportunity to participate in vocational programs;
5. Vocational education administrators often fail to adequately protect against discrimination in the placement of students with employers;
6. Faculty and staff are assigned to vocational programs on the basis of race, national origin, sex and handicap.

Reports from advocate groups have identified other possible civil rights violations. For example, the N.A.A.C.P. Legal Defense Fund (LDF) has alleged that State agencies engage in unlawful discrimination against urban areas in the allocation of Federal vocational education funds.

C. SCOPE OF GUIDELINES

The Guidelines primarily address the civil rights violations listed immediately above as found in compliance reviews. They do not identify every civil rights violation that may arise in a vocational education setting. The Guidelines derive from and supplement and must be read in conjunction with civil rights laws and Department regulations.

Section III of the Guidelines, which prohibits discrimination in the allocation of vocational education funds, derives in part from and must be read in conjunction with, the Vocational Education Act and Office of Education implementing regulations. These Guidelines, particularly Section III, have been reviewed by the Department's Office of Education and found consistent with its policies.

D. STATE AGENCY RESPONSIBILITIES

Most comments on the Guidelines sought deletion or clarification of, or a change to, a stated paragraph or subparagraph. However, Section II, which records the responsibilities of State agency personnel, was questioned in its entirety as imposing a new burden more reasonably assigned to the Office for Civil Rights.

Section II contains two requirements. First, State agencies in performing any activity required under State or Federal law, must be certain that they do not "require, approve of, or engage in" any unlawful discrimination. For example, State agencies are often required to review or approve the site selected by or the building specifications approved by local school district officials to assure that the project is fiscally sound. The Guidelines provide that in such cases the State agency must also examine whether the site location will result in the denial of access to minority group persons and whether the building and programs will be inaccessible to handicapped persons. If it finds such violations the State agency cannot approve the project. The second requirement of Section II is generally addressed to the agency referred to in the Vocational Education Amendments of 1976 as the "State Board or agency . . . sole[ly] responsible for the administration or . . . supervision of the programs [conducted in the State] under the Act." These agencies are required by the Guidelines to monitor subrecipients for civil rights compliance through technical assistance, analyses of already compiled information and data, and periodic compliance reviews.

These are not new requirements. The first merely restates what has become axiomatic—a recipient cannot engage or participate in unlawful discrimination. The second requirement—monitoring subrecipients for compliance—derives from the Department's Title VI regulation which provides in subparagraph 80.4(b):

> Every application by a State or State agency to carry out a program involving continuing Federal financial assistance * * * shall * * * provide or be accompanied by provision for such methods of administration * * * as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

Thus the Department's Title VI regulation requires State agency recipients to adopt and obtain Department approval for methods and procedures through which subrecipients can be monitored for compliance with civil rights authorities.[1]

It was suggested that it is "unrealistic" to expect closely aligned officials—State agency and local personnel—to work at odds with each other. This is neither the intent nor the expected result of the final Guidelines. Many forms of impermissible discrimination are caused by misunderstandings or lack of information and guidance on the requirements of the law. State agency personnel should therefore be of assistance to and not in conflict with local personnel. Moreover, there is a need for additional conciliatory rather than adversarial compliance activity.

State agencies also argued that the Office for Civil Rights cannot and should not delegate its responsibilities for civil rights enforcement to recipients. Such a result is neither intended nor expected. The Guidelines contemplate adding, not substituting, resources for civil rights compliance activity. The Bureau of Occupational and Adult Education presently monitors State agencies for compliance with the Vocational Education Act. Under the Guidelines, BOAE and State agencies will engage in activities supplementary to those of the Office for Civil Rights.[2] These Guidelines do

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[1] Although the regulations for Title IX and Section 504 do not assign a similar responsibility to State agencies, the Department intends to issue a Notice of Proposed Rulemaking to eliminate this inconsistency with Title VI. If revisions to the Title IX and Section 504 regulations are not adopted by the Department, these Guidelines must be revised.

[2] State agencies will require additional assistance from OCR and BOAE to understand and meet their responsibilities under the Guidelines. Such assistance will be provided through memoranda to be issued during the next 90 days. See comment response number 9, below.

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not contemplate any reduction of OCR compliance and enforcement activity. And OCR will lead, assist and monitor BOAE and State agencies in their civil rights activities. This approach derives from the Department's commitment to bring all of its agencies and recipients to the critical task of obtaining compliance with civil rights laws and regulations. It is also supported by the United States Civil Rights Commission.[3]

CONCLUSION

Vocational education is a critical and growing sector of the Nation's education system. It is offered in over 14,000 school districts and in community and junior colleges. It is also provided through more than 2,000 secondary and postsecondary vocational education centers (often known as Area Vocational Education Schools, or AVES), that have as their primary or sole objective the teaching of skills that lead to employment. The variations of programs and courses number in the thousands. They include, for example, "work study" for students needing part-time employment to support their vocational studies; "cooperative education" for students who receive credit for work at jobs related to their vocational field; and "apprentice training" for students affiliated with a labor union or another sponsor. Whatever the organization of vocational education, it is closely tied to the skill development needs of communities, States, and regions. Obtaining compliance with civil rights authorities in these diverse programs will require the participation and cooperation of all vocational education administrators and all agencies of the Department of Health, Education and Welfare. These Guidelines are designed to encourage that cooperation and compliance activity. They are provided with the expectation that they will contribute to bringing an end to unlawful discrimination against persons seeking the skills necessary for gainful and meaningful employment.

PART 80—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

1. In 45 CFR Part 80 Appendix B is added to read as follows:

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

I. SCOPE AND COVERAGE

A. APPLICATION OF GUIDELINES

These Guidelines apply to recipients of any Federal financial assistance from the Department of Health, Education, and Welfare that offer or administer programs of vocational education or training. This includes State agency recipients.

B. DEFINITION OF RECIPIENT

The definition of "recipient" of Federal financial assistance is established by Department regulations implementing Title VI, Title IX, and Section 504 (45 CFR 80.13(i), 86.2(h), 84.3(f).

For the purposes of Title VI:

The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary [e.g., students] under any such program. (45 CFR 80.13(i)).

For the purpose of Title IX:

"Recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof. (45 CFR 86.2(h)).

For the purposes of Section 504:

"Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. (45 CFR 84.3(f)).

C. EXAMPLES OF RECIPIENTS COVERED BY THESE GUIDELINES

The following education agencies, when they provide vocational education, are examples of recipients covered by these Guidelines:

1. The board of education of a public school district and its administrative agency.

2. The administrative board of a specialized vocational high school serving students from more than one school district.

3. The administrative board of a technical or vocation school that is used exclusively or principally for the provision of vocational education to persons who have completed or left high school (including persons seeking a certificate or an associate degree through a vocational program offered by the school) and who are available for study in preparation for entering the labor market.

4. The administrative board of a postsecondary institution, such as a technical institute, skill center, junior college, community college, or four year college that has a department or division that provides vocational education to students seeking immediate employment, a certificate or an associate degree.

5. The administrative board of a proprietary (private) vocational education school.

6. A State agency recipient itself operating a vocational education facility.

D. EXAMPLES OF SCHOOLS TO WHICH THESE GUIDELINES APPLY

The following are examples of the types of schools to which these Guidelines apply.

1. A junior high school, middle school, or those grades of a comprehensive high school that offers instruction to inform, orient, or prepare students for vocational education at the secondary level.

2. A vocational education facility operated by a State agency.

3. A comprehensive high school that has a department exclusively or principally used for providing vocational education; or that offers at least one vocational program to secondary level students who are available for study in preparation for entering the labor market; or that offers adult vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market.

4. A comprehensive high school, offering the activities described above, that receives students on a contract basis from other school districts for the purpose of providing vocational education.

5. A specialized high school used exclusively or principally for the provision of vocational education, that enrolls students from one or more school districts for the purpose of providing vocational education.

6. A technical or vocational school that primarily provides vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market, including students seeking an associate degree or certificate through a course of vocational instruction offered by the school.

7. A junior college, a community college, or four-year college that has a department or division that provides vocational education to students seeking immediate employment, an associate degree or a certificate through a course of vocational instruction offered by the school.

8. A proprietary school, licensed by the State, that offers vocational education.

NOTE.—Subsequent sections of these Guidelines may use the term *secondary vocational education center* in referring to the institutions described in paragraphs 3, 4 and 5 above or the term *postsecondary vocational education center* in referring to institutions described in paragraphs 6 and 7 above or the term *vocational education center* in referring to any or all institutions described above.

II. RESPONSIBILITIES ASSIGNED ONLY TO STATE AGENCY RECIPIENTS

A. RESPONSIBILITIES OF ALL STATE AGENCY RECIPIENTS

State agency recipients, in addition to complying with all other provisions of the Guidelines relevant to them, may not require, approve of, or engage in any discrimi-

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[3] United States Commission on Civil Rights. *The Federal Civil Rights Enforcement Effort—1974, Vol. VI, To Extend Federal Financial Assitance.* 1975, p. 809.

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nation or denial of services on the basis of race, color, national origin, sex, or handicap in performing any of the following activities:

1. Establishment of criteria or formulas for distribution of Federal or State funds to vocational education programs in the State;
2. Establishment of requirements for admission to or requirements for the administration of vocational education programs;
3. Approval of action by local entities providing vocational education. (For example, a State agency must ensure compliance with Section IV of these Guidelines if and when it reviews a vocational education agency decision to create or change a geographic service area.);
4. Conducting its own programs. (For example, in employing its staff it may not discriminate on the basis of sex or handicap.)

B. STATE AGENCIES PERFORMING OVERSIGHT RESPONSIBILITIES

The State agency responsible for the administration of vocational education programs must adopt a compliance program to prevent, identify and remedy discrimination on the basis of race, color, national origin, sex or handicap by its subrecipients. (A "subrecipient," in this context, is a local agency or vocational education center that receives financial assistance through a State agency.) This compliance program must include:

1. Collecting and analyzing civil rights related data and information that subrecipients compile for their own purposes or that are submitted to State and Federal officials under existing authorities;
2. Conducting periodic compliance reviews of selected subrecipients (i.e., an investigation of a subrecipient to determine whether it engages in unlawful discrimination in any aspect of its program); upon finding unlawful discrimination, notifying the subrecipient of steps it must take to attain compliance and attempting to obtain voluntary compliance;
3. Providing technical assistance upon request to subrecipients. This includes assisting subrecipients identify unlawful discrimination and instructing them in remedies for and prevention of such discrimination;
4. Periodically reporting its activities and findings under the foregoing paragraphs, including findings of unlawful discrimination under paragraph 2, immediately above, to the Office for Civil Rights.

State agencies are not required to terminate or defer assistance to any subrecipient. Nor are they required to conduct hearings. The responsibilities of the Office for Civil Rights to collect and analyze data, to conduct compliance reviews, to investigate complaints and to provide technical assistance are not diminished or attenuated by the requirements of Section II of the Guidelines.

C. STATEMENT OF PROCEDURES AND PRACTICES

Within one year from the publication of these Guidelines in final form, each State agency recipient performing oversight responsibilities must submit to the Office for Civil Rights the methods of administration and related procedures it will follow to comply with the requirements described in paragraphs A and B immediately above. The Department will review each submission and will promptly either approve it, or return it to State officials for revision.

III. Distribution of Federal Financial Assistance and Other Funds for Vocational Education

A. AGENCY RESPONSIBILITIES

Recipients that administer grants for vocational education must distribute Federal, State, or local vocational education funds so that no student or group of students is unlawfully denied an equal opportunity to benefit from vocational education on the basis of race, color, national origin, sex, or handicap.

B. DISTRIBUTION OF FUNDS

Recipients may not adopt a formula or other method for the allocation of Federal, State, or local vocational education funds that has the effect of discriminating on the basis of race, color, national origin, sex, or handicap. However, a recipient may adopt a formula or other method of allocation that uses as a factor race, color, national origin, sex, or handicap [or an index or proxy for race, color, national origin, sex, or handicap e.g., number of persons receiving Aid to Families with Dependent Children or with limited English speaking ability] if the factor is included to compensate for past discrimination or to comply with those provisions of the Vocational Education Amendments of 1976 designed to assist specified protected groups.

C. EXAMPLE OF A PATTERN SUGGESTING UNLAWFUL DISCRIMINATION

In each State it is likely that some local recipients will enroll greater proportions of minority students in vocational education than the State-wide proportion of minority students in vocational education. A funding formula or other method of allocation that results in such local recipients receiving per-pupil allocations of Federal or State vocational education funds lower than the State-wide average per-pupil allocation will be presumed unlawfully discriminatory.

D. DISTRIBUTION THROUGH COMPETITIVE GRANTS OR CONTRACTS

Each State agency that establishes criteria for awarding competitive vocational education grants or contracts must establish and apply the criteria without regard to the race, color, national origin, sex, or handicap of any or all of a recipient's students, except to compensate for past discrimination.

E. APPLICATION PROCESSES FOR COMPETITIVE OR DISCRETIONARY GRANTS

State agencies must disseminate information needed to satisfy the requirements of any application process for competitive or discretionary grants so that all recipients, including those having a high percentage of minority or handicapped students, are informed of and able to seek funds. State agencies that provide technical assistance for the completion of the application process must provide such assistance without discrimination against any one recipient or class of recipients.

F. ALTERATION OF FUND DISTRIBUTION TO PROVIDE EQUAL OPPORTUNITY

If the Office for Civil Rights finds that a recipient's system for distributing vocational education funds unlawfully discriminates on the basis of race, color, national origin, sex, or handicap, it will require the recipient to adopt an alternative nondiscriminatory method of distribution. The Office for Civil Rights may also require the recipient to compensate for the effects of its past unlawful discrimination in the distribution of funds.

IV. Access and Admission of Students To Vocational Education Programs

A. RECIPIENT RESPONSIBILITIES

Criteria controlling student eligibility for admission to vocational education schools, facilities and programs may not unlawfully discriminate on the basis of race, color, national origin, sex, or handicap. A recipient may not develop, impose, maintain, approve, or implement such discriminatory admissions criteria.

B. SITE SELECTION FOR VOCATIONAL SCHOOLS

State and local recipients may not select or approve a site for a vocational education facility for the purpose or with the effect of excluding, segregating, or otherwise discriminating against students on the basis of race, color, or national origin. Recipients must locate vocational education facilities at sites that are readily accessible to both nonminority and minority communities, and that do not tend to identify the facility or program as intended for nonminority or minority students.

C. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS BASED ON RESIDENCE

Recipients may not establish, approve or maintain geographic boundaries for a vocational education center service area or attendance zone, (hereinafter "service area"), that unlawfully exclude students on the basis of race, color, or national origin. The Office for Civil Rights will presume subject to rebuttal, that any one or combination of the following circumstances indicates that the boundaries of a given service area are unlawfully constituted:

1. A school system or service area contiguous to the given service area, contains minority or nonminority students in substantially greater proportion than the given service area;
2. A substantial number of minority students who reside outside the given vocational education center service area, and who are not eligible for the center reside, nonetheless, as close to the center as a substantial number of non-minority students who are eligible for the center;
3. The over-all vocational education program of the given service area in comparison to the over-all vocational education program of a contiguous school system or service area enrolling a substantially greater proportion of minority students: (a) provides its students with a broader range of curricular offerings, facilities and equipment; or (b) provides its graduates greater opportunity for employment in jobs: (i) for which there is a demonstrated need in the community or region; (ii) that pay higher entry level salaries or wages; or (iii) that are generally acknowledged to offer greater prestige or status.

D. ADDITIONS AND RENOVATIONS TO EXISTING VOCATIONAL EDUCATION FACILITIES

A recipient may not add to, modify, or renovate the physical plant of a vocational education facility in a manner that creates, maintains, or increases student segregation on the basis of race, color, national origin, sex, or handicap.

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E. REMEDIES FOR VIOLATIONS OF SITE SELECTION AND GEOGRAPHIC SERVICE AREA REQUIREMENTS

If the conditions specified in paragraphs IV. A. B. C. or D. immediately above, are found and not rebutted by proof of nondiscrimination, the Office for Civil rights will require the recipient(s) to submit a plan to remedy the discrimination. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination: (1) redrawing of the boundaries of the vocational education center's service area to include areas unlawfully excluded and/or to exclude areas unlawfully included; (2) provision of transportation to students residing in areas unlawfully excluded; (3) provision of additional programs and services to students who would have been eligible for attendance at the vocational education center but for the discriminatory service area or site selection; (4) reassignment of students; and (5) construction of new facilities or expansion of existing facilities.

F. ELIGIBILITY FOR ADMISSION TO SECONDARY VOCATIONAL EDUCATION CENTERS BASED ON NUMERICAL LIMITS IMPOSED ON SENDING SCHOOLS

A recipient may not adopt or maintain a system for admission to a secondary vocational education center or program that limits admission to a fixed number of students from each sending school included in the center's service area if such a system disproportionately excludes students from the center on the basis of race, sex, national origin or handicap. (Example: Assume 25 percent of a school district's high school students are black and that most of those black students are enrolled in one high school; the white students, 75 percent of the district's total enrollment, are generally enrolled in the five remaining high schools. This paragraph prohibits a system of admission to the secondary vocational education center that limits eligibility to a fixed and equal number of students from each of the district's six high schools.)

G. REMEDIES FOR VIOLATION OF ELIGIBILITY BASED ON NUMERICAL LIMITS REQUIREMENTS

If the Office for Civil Rights finds a violation of paragraph F, above, the recipient must implement an alternative system of admissions that does not disproportionately exclude students on the basis of race, color, national origin, sex, or handicap.

H. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS, BRANCHES OR ANNEXES BASED UPON STUDENT OPTION

A vocational education center, branch or annex, open to all students in a service area and predominantly enrolling minority students or students of one race, national origin or sex, will be presumed unlawfully segregated if: 1) it was established by a recipient for members of one race, national origin or sex; or 2) it has since its construction been attended primarily by members of one race, national origin or sex; or 3) most of its program offerings have traditionally been selected predominantely by members of one race, national origin or sex.

I. REMEDIES FOR FACILITY SEGREGATION UNDER STUDENT OPTION PLANS

If the conditions specified in paragraph IV-H are found and not rebutted by proof of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the segregation. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination:

(1) elimination of program duplication in the segregated facility and other proximate vocational facilities; (2) relocation or "clustering" of programs or courses; 3) adding programs and courses that traditionally have been identified as intended for members of a particular race, national origin or sex to schools that have traditionally served members of the other sex or traditionally served persons of a different race or national origin; 4) merger of programs into one facility through school closings or new construction; 5) intensive outreach, recruitment and counseling; 6) providing free transportation to students whose enrollment would promote desegregation.

[Paragraph J omitted]

K. ELIGIBILITY BASED ON EVALUATION OF EACH APPLICANT UNDER ADMISSIONS CRITERIA

Recipients may not judge candidates for admission to vocational education programs on the basis of criteria that have the effect of disproportionately excluding persons of a particular race, color, national origin, sex, or handicap. However, if a recipient can demonstrate that such criteria have been validated as essential to participation in a given program and that alternative equally valid criteria that do not have such a disproportionate adverse effect are unavailable, the criteria will be judged nondiscriminatory. Examples of admissions criteria that must meet this test are past academic performance, record of disciplinary infractions, counselors' approval, teachers' recommendations, interest inventories, high school diploma and standardized tests, such as the Test of Adult Basic Education (TABE).

An introductory, preliminary, or exploratory course may not be established as a prerequisite for admission to a program unless the course has been and is available without regard to race, color, national origin, sex, and handicap. However, a course that was formerly only available on a discriminatory basis may be made a prerequisite for admission to a program if the recipient can demonstrate that: (a) the course is essential to participation in the program; *and* (b) the course is presently available to those seeking enrollment for the first time and to those formerly excluded.

L. ELIGIBILITY OF NATIONAL ORIGIN MINORITY PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

Recipients may not restrict an applicant's admission to vocational education programs because the applicant, as a member of a national origin minority with limited English language skills, cannot participate in and benefit from vocational instruction to the same extent as a student whose primary language is English. It is the responsibility of the recipient to identify such applicants and assess their ability to participate in vocational instruction.

Acceptable methods of identification include: (1) identification by administrative staff, teachers, or parents of secondary level students; (2) identification by the student in postsecondary or adult programs; and (3) appropriate diagnostic procedures, if necessary.

Recipients must take steps to open all vocational programs to these national origin minority students. A recipient must demonstrate that a concentration of students with limited English language skills in one or a few programs is not the result of discriminatory limitations upon the opportunities available to such students.

M. REMEDIAL ACTION IN BEHALF OF PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

If the Office for Civil Rights finds that a recipient has denied national origin minority persons admission to a vocational school or program because of their limited English language skills or has assigned students to vocational programs solely on the basis of their limited English language skills, the recipient will be required to submit a remedial plan that insures national origin minority students equal access to vocational education programs.

N. EQUAL ACCESS FOR HANDICAPPED STUDENTS

Recipients may not deny handicapped students access to vocational education programs or courses because of architectural or equipment barriers, or because of the need for related aids and services or auxiliary aids. If necessary, recipients must: (1) modify instructional equipment; (2) modify or adapt the manner in which the courses are offered; (3) house the program in facilities that are readily accessible to mobility impaired students or alter facilities to make them readily accessible to mobility impaired students; and (4) provide auxiliary aids that effectively make lectures and necessary materials available to postsecondary handicapped students; (5) provide related aids or services that assure secondary students an appropriate education.

Academic requirements that the recipient can demonstrate are essential to a program of instruction or to any directly related licensing requirement will not be regarded as discriminatory. However, where possible, a recipient must adjust those requirements to the needs of individual handicapped students.

Access to vocational programs or courses may not be denied handicapped students on the ground that employment opportunities in any occupation or profession may be more limited for handicapped persons than for non-handicapped persons.

O. PUBLIC NOTIFICATION

Prior to the beginning of each school year, recipients must advise students, parents, employees and the general public that all vocational opportunities will be offered without regard to race, color, national origin, sex, or handicap. Announcement of this policy of non-discrimination may be made, for example, in local newspapers, recipient publications and/or other media that reach the general public, program beneficiaries, minorities (including national origin minorities with limited English language skills), women, and handicapped persons. A brief summary of program offerings and admission criteria should be included in the announcement; also the name, address and telephone number of the person designated to coordinate Title IX and Section 504 compliance activity.

If a recipient's service area contains a community of national origin minority persons with limited English language skills, public notification materials must be disseminated to that community in its lan-

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guage and must state that recipients will take steps to assure that the lack of English language skills will not be a barrier to admission and participation in vocational education programs.

V. COUNSELING AND PREVOCATIONAL PROGRAMS

A. RECIPIENT RESPONSIBILITIES

Recipients must insure that their counseling materials and activities (including student program selection and career/employment selection), promotional, and recruitment efforts do not discriminate on the basis of race, color, national origin, sex, or handicap.

B. COUNSELING AND PROSPECTS FOR SUCCESS

Recipients that operate vocational education programs must insure that counselors do not direct or urge any student to enroll in a particular career or program, or measure or predict a student's prospects for success in in any career or program based upon the student's race, color, national origin, sex, or handicap. Recipients may not counsel handicapped students toward more restrictive career objectives than nonhandicapped students with similar abilities and interests. If a vocational program disproportionately enrolls male or female students, minority or nonminority students, or handicapped students, recipients must take steps to insure that the disproportion does not result from unlawful discrimination in counseling activities.

C. STUDENT RECRUITMENT ACTIVITIES

Recipients must conduct their student recruitment activities so as not to exclude or limit opportunities on the basis of race, color, national origin, sex, or handicap. Where recruitment activities involve the presentation or portrayal of vocational and career opportunities, the curricula and programs described should cover a broad range of occupational opportunities and not be limited on the basis of the race, color, national origin, sex, or handicap of the students or potential students to whom the presentation is made. Also, to the extent possible, recruiting teams should include persons of different races, national origins, sexes, and handicaps.

D. COUNSELING OF STUDENTS WITH LIMITED ENGLISH-SPEAKING ABILITY OR HEARING IMPAIRMENTS

Recipients must insure that counselors can effectively communicate with national origin minority students with limited English language skills and with students who have hearing impairments. This requirement may be satisfied by having interpreters available.

E. PROMOTIONAL ACTIVITIES

Recipients may not undertake promotional efforts (including activities of school officials, counselors, and vocational staff) in a manner that creates or perpetuates stereotypes or limitations based on race, color, national origin, sex or handicap. Examples of promotional efforts are career days, parents' night, shop demonstrations, visitations by groups of prospective students and by representatives from business and industry. Materials that are part of promotional efforts may not create or perpetuate stereotypes through text or illustration. To the extent possible they should portray m[illegible] or females, minorities or handicapped p[illegible]sons in programs and occupations in which these groups traditionally have not been represented. If a recipient's service area contains a community of national origin minority persons with limited English language skills, promotional literature must be distributed to that community in its language.

VI. EQUAL OPPORTUNITY IN THE VOCATIONAL EDUCATION INSTRUCTIONAL SETTING

A. ACCOMMODATIONS FOR HANDICAPPED STUDENTS

Recipients must place secondary level handicapped students in the regular educational environment of any vocational education program to the maximum extent appropriate to the needs of the student unless it can be demonstrated that the education of the handicapped person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Handicapped students may be placed in a program only after the recipient satisfies the provisions of the Department's Regulation, 45 CFR Part 84, relating to evaluation, placement, and procedural safeguards. If a separate class or facility is identifiable as being for handicapped persons, the facility, the programs, and the services must be comparable to the facilities, programs, and services offered to nonhandicapped students.

B. STUDENT FINANCIAL ASSISTANCE

Recipients may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies, compensation for work, or prizes to vocational education students on the basis of race, color, national origin, sex, or handicap, except to overcome the effects of past discrimination. Recipients may administer sex restricted financial assistance where the assistance and restriction are established by will, trust, bequest, or any similar legal instrument, if the overall effect of all financial assistance awarded does not discriminate on the basis of sex. Materials and information used to notify students of opportunities for financial assistance may not contain language or examples that would lead applicants to believe the assistance is provided on a discriminatory basis. If a recipient's service area contains a community of national origin minority persons with limited English language skills, such information must be disseminated to that community in its language.

C. HOUSING IN RESIDENTIAL POSTSECONDARY VOCATIONAL EDUCATION CENTERS

Recipients must extend housing opportunities without discrimination based on race, color, national origin, sex, or handicap. This obligation extends to recipients that provide on-campus housing and/or that have agreements with providers of off-campus housing. In particular, a recipient postsecondary vocational education program that provides on-campus or off-campus housing to its nonhandicapped students must provide, at the same cost and under the same conditions, comparable convenient and accessible housing to handicapped students.

D. COMPARABLE FACILITIES

Recipients must provide changing rooms, showers, and other facilities for students of one sex that are comparable to those provided to students of the other sex. This may be accomplished by alternating use of the same facilities or by providing separate, comparable facilities.

Such facilities must be adapted or modified to the extent necessary to make the vocational education program readily a[illegible]ible to handicapped persons.

VII. WORK STUDY, COOPERATIVE VOCATIONAL EDUCATION, JOB PLACEMENT, AND APPRENTICE TRAINING

A. RESPONSIBILITIES IN COOPERATIVE VOCATIONAL EDUCATION PROGRAMS, WORK-STUDY PROGRAMS, AND JOB PLACEMENT PROGRAMS

A recipient must insure that: (a) it does not discriminate against its students on the basis of race, color, national origin, sex, or handicap in making available opportunities in cooperative education, work study and job placement programs; and (b) students participating in cooperative education, work study and job placement programs are not discriminated against by employers or prospective employers on the basis of race, color, national origin, sex, or handicap in recruitment, hiring, placement, assignment to work tasks, hours of employment, levels of responsibility, and in pay.

If a recipient enters into a written agreement for the referral or assignment of students to an employer, the agreement must contain an assurance from the employer that students will be accepted and assigned to jobs and otherwise treated without regard to race, color, national origin, sex, or handicap.

Recipients may not honor any employer's request for students who are free of handicaps or for students of a particular race, color, national origin, or sex. In the event an employer or prospective employer is or has been subject to court action involving discrimination in employment, school officials should rely on the court's findings if the decision resolves the issue of whether the employer has engaged in unlawful discrimination.

B. APPRENTICE TRAINING PROGRAMS

A recipient may not enter into any agreement for the provision or support of apprentice training for students or union members with any labor union or other sponsor that discriminates against its members or applicants for membership on the basis of race, color, national origin, sex, or handicap. If a recipient enters into a written agreement with a labor union or other sponsor providing for apprentice training, the agreement must contain an assurance from the union or other sponsor: (1) that it does not engage in such discrimination against its membership or applicants for membership; and (2) that apprentice training will be offered and conducted for its membership free of such discrimination.

VIII. EMPLOYMENT OF FACULTY AND STAFF

A. EMPLOYMENT GENERALLY

Recipients may not engage in any employment practice that discriminates against any employee or applicant for employment on the basis of sex or handicap. Recipients may not engage in any employment practice that discriminates on the basis of race, color, or national origin if such discrimination tends to result in segregation, exclusion or other discrimination against students.

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B. RECRUITMENT

Recipients may not limit their recruitment for employees to schools, communities, or companies disproportionately composed of persons of a particular race, color, national origin, sex, or handicap except for the purpose of overcoming the effects of past discrimination. Every source of faculty must be notified that the recipient does not discriminate in employment on the basis of race, color, national origin, sex, or handicap.

C. PATTERNS OF DISCRIMINATION

Whenever the Office for Civil Rights finds that in light of the representation of protected groups in the relevant labor market there is a significant underrepresentation or overrepresentation of protected group persons on the staff of a vocational education school or program, it will presume that the disproportion results from unlawful discrimination. This presumption can be overcome by proof that qualified persons of the particular race, color, national origin, or sex, or that qualified handicapped persons are not in fact available in the relevant labor market.

D. SALARY POLICIES

Recipients must establish and maintain faculty salary scales and policy based upon the conditions and responsibilities of employment, without regard to race, color, national origin, sex or handicap.

E. EMPLOYMENT OPPORTUNITIES FOR HANDICAPPED APPLICANTS

Recipients must provide equal employment opportunities for teaching and administrative positions to handicapped applicants who can perform the essential functions of the position in question. Recipients must make reasonable accommodation for the physical or mental limitations of handicapped applicants who are otherwise qualified unless recipients can demonstrate that the accommodation would impose an undue hardship.

F. THE EFFECTS OF PAST DISCRIMINATION

Recipients must take steps to overcome the effects of past discrimination in the recruitment, hiring, and assignment of faculty. Such steps may include the recruitment or reassignment of qualified persons of a particular race, national origin, or sex, or who are handicapped.

G. STAFF OF STATE ADVISORY COUNCILS OF VOCATIONAL EDUCATION

State Advisory Councils of Vocational Education are recipients of Federal financial assistance and therefore must comply with Section VIII of the Guidelines.

H. EMPLOYMENT AT STATE OPERATED VOCATIONAL EDUCATION CENTERS THROUGH STATE CIVIL-SERVICE AUTHORITIES

Where recruitment and hiring of staff for State operated vocational education centers is conducted by a State civil service employment authority, the State education agency operating the program must insure that recruitment and hiring of staff for the vocational education center is conducted in accordance with the requirements of these Guidelines.

IX. PROPRIETARY VOCATIONAL EDUCATION SCHOOLS

A. RECIPIENT RESPONSIBILITIES

Proprietary vocational education schools that are recipients of Federal financial assistance through Federal student assistance programs or otherwise are subject to all of the requirements of the Department's regulations and these Guidelines.

B. ENFORCEMENT AUTHORITY

Enforcement of the provisions of Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973 is the responsibility of the Department of Health, Education, and Welfare. However, authority to enforce Title VI of the Civil rights Act of 1964 for proprietary vocational education schools has been delegated to the Veterans Administration.

When the Office for Civil Rights receives a Title VI complaint alleging discrimination by a proprietary vocational education school it will forward the complaint to the Veterans Administration and cite the applicable requirements of the Department's regulations and these Guidelines. The complainant will be notified of such action.

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

2. In 45 CFR Part 84 Appendix B is added to read as follows:

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

NOTE.—For the text of these guidelines, see 45 CFR Part 80, Appendix B.

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

3. In 45 CFR Part 86 Appendix A is added to read as follows:

APPENDIX A—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

NOTE.—For the text of these guidelines, see 45 CFR Part 80, Appendix B.

DAVID S. TATEL,
Director, Office for Civil Rights,
Department of Health, Education, and Welfare.

MARCH 15, 1979.

COMMENTS AND RECOMMENDATIONS

Over 130 comments and recommendations were received by the Office for Civil Rights in response to the December 19, 1978 publication of proposed Guidelines. (43 FR 59105) Many identified deficiencies that resulted in significant changes to the Guidelines. Each comment was carefully considered before a response was prepared. The following comments and responses are adopted by the Department as a part of the Guidelines.

SUPPLEMENTARY INFORMATION

1. *Comment:* Commenters stated that the Supplementary Information section was unfairly critical of vocational education administrators, relied too heavily on outdated and suspect data, and ignored the advances achieved under the Vocational Education Amendments of 1976.

Response: The objections have merit and changes have been made. The Supplementary Information section has been revised to include current data, to delete outdated and suspect data, to place greater emphasis on OCR investigations and compliance reviews and to acknowledge that vocational education administrators have responded to antidiscrimination measures of the Vocational Education Amendments of 1976.

SECTION I—SCOPE AND COVERAGE

2. *Comment:* Commenters recommended that paragraph I-A state with clarity that the Guidelines apply to all recipients of financial assistance from the Department of Health, Education, and Welfare and not merely to recipients of Federal vocational education funds.

Response: The recommendation is accepted and paragraph I-A has been modified.

3. *Comment:* One commenter suggested that OCR establish a single definition of "recipient" in its Title VI, Title IX and Section 504 regulations to the extent permitted by the underlying legislation.

Response: A single definition of "recipient" would be helpful. However, the change proposed is beyond the scope of the Guidelines project.

4. *Comment:* Commenters requested that the Guidelines state the responsibilities of recipients under the Age Discrimination Act of 1975.

Response: Regulations under the Age Discrimination Act have not yet been issued. The Guidelines will ultimately include coverage of age discrimination.

5. *Comment:* A commenter recommended that paragraph I-C include as an education agency providing vocational education, "the State Board of Vocational Education and/or a State board or body providing vocational education."

Response: Paragraph I-A states that State agency recipients are covered by the Guidelines. Paragraph I-C provides examples of recipients covered by the Guidelines and lists, at I-C(6),

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"a State agency . . . operating a vocational education facility."

6. *Comment:* Commenters requested that paragraph I(D)(6) and (7) be amended to include "certificate programs."

Response: The suggested change has been adopted.

7. *Comment:* Commenters requested that paragraph I-D list as recipients vocational rehabilitation centers and residential centers.

Response: Paragraph I-D provides examples of covered schools. The Guidelines also apply to vocational rehabilitation centers and residential vocational education centers.

8. *Comment:* One commenter requested a definition of the term "subrecipient."

Response: The term "subrecipient" is defined in paragraph II-B.

SECTION II—RESPONSIBILITIES OF STATE AGENCIES

9. *Comment:* Commenters found paragraph II-B incomplete and vague.

Response: This objection has merit. The paragraph has been substantially revised to clarify State agency responsibilities. Definitions of "technical assistance" and of "compliance review" have been added (paragraph (B)(2) and (3)). The Guidelines now state that the Department, not the State agency, has the responsibility and authority to make formal fact findings and terminate and defer Federal funds.

While these additions to the final Guidelines answer several of the specific questions raised by the commenters much more needs to be done. Within 90 days, the Office for Civil Rights and the Bureau of Occupational and Adult Education will issue memoranda that provide the additional detail necessary for successful State agency compliance activity.

10. *Comment:* Commenters argued that paragraph II-B imposes new requirements on State agency recipients.

Response: State agencies, as well as other recipients of Federal financial assistance, are prohibited from conducting their programs through subrecipients or contractors that discriminate. See for example, 45 CFR Sections 80.3(b), 84.4(b)(4), 86.32(b),(d). The Title VI regulations clearly include a State agency obligation to adopt "methods of administration" for monitoring subrecipients for civil rights compliance.[1] However, this requirement has not been enforced against State education agencies. The Department believes that this must be corrected. To be effective, civil rights compliance activity cannot be the exclusive province of Federal civil rights agencies; it must include Department program agencies (in this case the Bureau of Occupational and Adult Education) and State agencies.

11. *Comment:* Commenters argued that the requirements imposed on State agencies by paragraph II-B are unduly burdensome and costly.

Response: Subparagraph B(1) has been revised to insure that no significant additional data collection or record keeping requirement is imposed on recipients. In addition, the requirement that State agencies investigate complaints has been deleted. Civil rights enforcement, however, must be recognized as important enough to merit the allocation of necessary funds. Federal, State, and local funds and resources available for vocational education must be used for civil rights compliance activities in vocational education programs. The obligations imposed are therefore not unreasonably burdensome.

12. *Comment:* Commenters stated that OCR, through paragraph II-B, is assigning or delegating its enforcement responsibilities to the States.

Response: The Guidelines contemplate a cooperative effort among OCR, the Bureau of Occupational and Adult Education, and State agencies. Their purpose is to add, not substitute, resources for civil rights compliance activity. The Guidelines now clearly state what was always intended: The Office for Civil Rights will not decrease its compliance activity in vocational education programs.

13. *Comment:* Commenters stated that proposed paragraph II-D, which attempted to establish a clear division between State and local responsibilities, was confusing and inconsistent with other sections of the Guidelines. They asked that the paragraph be deleted. It was also suggested that the heading of Section II and the first sentence of paragraph II-A should state that the enumerated requirements are only one aspect of a State agency's responsibilities under the Guidelines.

Response: The suggested changes are adopted as consistent with the intent of the Guidelines.

SECTION III—DISTRIBUTION OF FEDERAL FINANCIAL ASSISTANCE AND OTHER FUNDS FOR VOCATIONAL EDUCATION

14. *Comment:* Commenters argued that protected group persons must be provided "equal opportunity" not merely "opportunity" (paragraph III-A).

Response: This suggestion is accepted. The opportunity for vocational training must be equal for all students without regard to race, color, national origin, sex, or handicap. The provision of unequal facilities, for example, cannot be excused because it is a less than total denial of opportunity.

15. *Comment:* Commenters questioned whether the purpose of proposed paragraph III-B was to prohibit discrimination in the development of a formula (input standard) or in the allocation of funds (output standard). The policy statement in proposed paragraph III-B controlled factors in the formula while the example cited in the paragraph was based on fund allocations.

Response: The Office for Civil Rights may review a formula's components. However, its primary inquiry will be whether the formula has a discriminatory effect on the allocation of funds. Accordingly, the first sentence in paragraph III-B has been rewritten to delete the reference to "factors."

16. *Comment:* Commenters suggested rephrasing paragraph III-B to permit the use of factors that remedy the effects of past discrimination. Others suggested that the Department uphold the use of indicia that enable the State to identify communities entitled to priority under the Vocational Education Act. For example, a State vocational education distribution formula may refer to the number of persons residing in a school district receiving aid to families with dependent children or with limited English speaking ability. The purpose of such a reference is to identify areas either economically depressed or with high concentrations of low-income people.

Response: The suggestions are accepted. Judicial precedent requires recipients to undertake affirmative or remedial action when directed by Congress or in response to a finding of past discrimination. In addition, the adoption of the recommended language confirms that a recipient's use of data on AFDC or LESA populations to comply with the Vocational Education Act is consistent with civil rights authorities.

17. *Comment:* Commenters asked for an explanation of the second sentence in proposed paragraph III-B: "State agencies must apply formula provisions under the Vocational Education Amendments of 1976 in a manner consistent with civil rights authorities." They believe that the statement suggests an inconsistency between civil rights authorities and the targeting provisions of the Vocational Education Act.

Response: The sentence does suggest a tension between the provisions of the Vocational Education Act and civil rights authorities. In fact, they are complementary. Paragraph III-B, as revised, contains the essential language prohibiting discrimination in the application of a formula. The chal-

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[1] HEW plans to propose an amendment to its regulations that confirms that recipients have an identical obligation under Title IX and Section 504. See "Supplementary Information, Part C. State Agency Responsibilities," above.

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lenged sentence has therefore been deleted.

18. *Comment:* Commenters questioned whether the example used in proposed paragraph III-B (now in III-C) is intended to require equal per-pupil allocations of funds.

Response: Section 106(a)(5)(B)(ii) of the Vocational Education Act prohibits the adoption of a formula seeking equal per-pupil allocations of funds. Rather it requires priority funding for subrecipients serving the greatest concentrations of low income families, for subrecipients least able to pay, and for subrecipients serving the greatest concentrations of students whose education imposes higher than average costs (e.g., handicapped students, students from low-income families, and students from families in which English is not the dominant language). These statutory priorities should result in greater expenditures for communities with concentrations of minority group persons. For this reason the gauge of unlawful discrimination contained in the Guidelines—a finding of lower allocations for communities containing concentrations of minority persons—will generally indicate a high probability of noncompliance.

In addition to an analysis of allocations State-wide, OCR may examine individual districts with substantial numbers of minority students to determine if such districts receive lower per-pupil allocations than the State-wide average.

19. *Comment:* A funding formula will be presumed unlawfully discriminatory if the circumstances recorded in paragraph III-B (now paragraph III-C) are present. Commenters asked for examples of evidence that will rebut the presumption.

Response: Two examples of persuasive rebuttal evidence derive from the Vocational Education Act. First, under Section 106(a)(5)(A)(ii) a State must give priority to funding applications that propose programs new to a service area and that are designed to meet emerging or projected manpower needs and job opportunities. These priorities are not directly related to economic need. Therefore the application of these priorities may in some circumstances be used by a State agency to rebut the presumption of discrimination arising from an inadequate allocation of funds to recipients enrolling a disproportionately high percentage of minorities. Secondly, Section 106(a)(4) requires the distribution of Federal vocational education funds on the basis of annual applications. An eligible recipient that fails to submit an application is prohibited from receiving Federal funds. A similar requirement may control the allocation of State funds under the provisions of a State law. For this reason, the failure of urban or other recipients to apply for funds must be considered before a finding of compliance or noncompliance can be made.

These are only examples of rebuttal evidence that will be considered. Each case must be decided on the basis of a careful analysis of all evidence believed relevant by the recipient and by the Office for Civil Rights.

20. *Comment:* Commenters asked whether the presumption of paragraph III-C will be applied to each type of vocational education program or to combined State allocations; whether Federal and State funds will be examined separately or in combination; whether both operating costs and capital expenditures will be examined; whether the distribution formula will be judged on an annual basis or over a period of years.

Response: Section 106(a)(5) of the Vocational Education Act requires the States to base the distribution of Federal funds on economic, social, and demographic factors relating to the need for vocational education. The Commissioner of Education has ruled in 42 F.R. 53865 (Question 41) that the State's funding formula under section 106(a)(5) must be applied to each of the following Vocational Education Act programs: basic grant (section 120), guidance and counseling (section 134), special programs for the disadvantaged (section 140), and consumer and homemaking programs (section 150). To insure consistency with Office of Education directives under the Vocational Education Act, the Guidelines' requirements may be applied to each of the programs set out above.

The statutory factors listed in section 106(a)(5) of the Vocational Education Act apply to the distribution of Federal vocational education funds. A State may elect to distribute State funds under the same or a different formula. In any event, OCR may separately consider State and Federal allocations to determine whether each is consistent with civil rights authorities.

The distribution formula governs the allocation of all grants to subrecipients under Sections 120, 134, 140, and 150, including those for operating costs and capital expenditures. OCR may therefore examine both operating costs and capital expenditures.

States are required to describe the formula for the distribution of Federal funds in their five year plans (45 CFR 104.182(d)). In applying the gauge of unlawful discrimination to State formulas, OCR may consider expenditures for a single year, or for such other period it finds relevant to whether unlawful discrimination has occurred.

21. *Comment:* A commenter asked whether paragraph III-B (now III-B and III-C) applies to local as well as State agencies. Others asked whether the gauge of compliance, now recorded in paragraph III-C, applies to local agencies.

Respone: Paragraph III-B has been revised to clarify that it applies to all recipients that allocate Federal, State, or local funds among other recipients or schools. Thus, the paragraph applies to local agencies that employ a formula or "other method of allocation" to distribute funds among administrative subdistricts.

The gauge of compliance, recorded in paragraph III-C, refers to a potential misallocation of State and Federal funds. Although this gauge must prove in practice to be a convenient and informative measure, it will tentatively also be used to evaluate allocations of local funds.

22. *Comment:* State agencies argued they could not control the allocation of local funds.

Response: A State agency is not expected to provide protection against an improper allocation of local funds unless it has authority to review or approve local allocations.

23. *Comment:* Commenters argued that OCR lacks authority to monitor State vocational education funds. They argued that paragraph III-B should only control the allocation of Federal funds.

Response: The Department has an obligation to provide protection against unlawful discrimination in any and all facets of a program funded in whole or in part with Federal funds. A recipient of Federal funds may not unlawfully discriminate in the allocation or use of such funds or in the allocation or use of any other funds under its control. Of course, as one commenter notes, if the Department finds it necessary to proceed against any recipient, it may only attempt to defer or terminate HEW Federal funds.

24. *Comment:* Commenters suggested that the phrase "available through Federal funds" (paragraph III-C now III-D), improperly suggests that civil rights authorities apply only to competitive grants or contracts paid for with Federal funds under the Vocational Education Act. They urged that the phrase be deleted.

Response: The suggestion is accepted. A State agency receiving Federal funds may not discriminate in the allocation or distribution of any funds under its control.

25. *Comment:* Commenters thought the example, now recorded in paragraph III-C, should not be referred to in the paragraph relating to competitive grants and contracts.

Response: The example cannot be meaningfully applied to competitive grants and contracts. The reference has therefore been deleted.

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26. *Comment:* Commenters suggested that paragraph III-E (now III-F) state that in appropriate circumstances a State may be required to remedy the effects of a prior unlawfully discriminatory distribution of funds.

Response: The Comment is accepted. It is well established that a recipient must remedy past unlawful discrimination and provide protection against like discrimination in the future.

27. *Comment:* Commenters questioned whether paragraph III-E (now III-F) affects the Commissioner of Education's authority to approve or direct a change in the State's method of fund distribution.

Response: If a State system for distributing Federal vocational education funds violates civil rights authorities, the Office of Education and the Office for Civil Rights will jointly seek corrective action.

SECTION IV—ACCESS AND ADMISSION OF STUDENTS

28. *Comment:* Commenters stated that the proposed Guidelines prohibited only future unlawful discrimination. They suggested a prohibition against recipients "maintaining" unlawfully discriminatory practices.

Response: This suggestion is accepted. Recipients must eliminate the effects of past discrimination and ensure nondiscrimination in the future.

29. *Comment:* Commenters suggested that paragraph IV-B be amended to require that sites be accessible to handicapped persons.

Response: The requirement of program accessibility for mobility impaired persons is contained in paragraph IV-N.

30. *Comment:* Commenters argued that new sites should be "equally" accessible rather than "readily" accessible to minority students.

Response: It is generally impossible to find or judge sites "equally" accessible to minority and nonminority communities. Recipients should attempt to locate facilities in perfectly neutral sites; but no change in the Guidelines is required or appropriate.

31. *Comment:* Recipient commenters stated that they often do not have authority to select sites for new facilities.

Response: Recipients that do not have authority to select, review, or approve sites have no obligations under this provision.

32. *Comment:* Commenters objected to paragraph IV-C on the ground that it conflicts with State statutes that limit certain programs offered by a district to students residing within that district.

Response: State laws that limit the admission of students to programs on the basis of residence within a district may be cited by recipients as proof of nondiscrimination. The adequacy or accuracy of that claim will depend upon all of the facts and will vary from State to State and from case to case.

33. *Comment:* Commenters suggested that student reassignment is an additional remedy for site selection and geographic service area violations (proposed paragraph IV-D, now paragraph IV-E).

Response: This suggestion is accepted. For example, if high school vocational education programs are unlawfully segregated because of a geographic zone boundary, the segregation may be remedied through student reassignments.

34. *Comment:* Commenters thought the geographic zoning requirements for secondary vocational schools (paragraph IV-C) should be the same for postsecondary institutions (proposed paragraph IV-E).

Response: Geographic service area or attendance zone boundaries for vocational education centers are generally used at the secondary level. However, paragraph IV-C and IV-E apply to postsecondary institutions that limit admission on the basis of student residence. The separate paragraph for postsecondary institutions has therefore been deleted.

35. *Comment:* Generally, students may not attend an Area Vocational Education School (AVES) unless they reside within one of the school districts participating in the consortium. Commenters objected that paragraph IV-C will result in an unfair requirement that students from nonparticipating districts be admitted to the area school.

Response: In the event the "circumstances" listed in paragraph IV-C arise in a comparison between a consortium and a school district adjacent to a consortium, a recipient(s) may rebut the resulting presumption of unlawful discrimination through proof that compelling reasons justified the inclusion and exclusion of contiguous districts. For example, recipients may demonstrate that an excluded district failed to approve a bond issue needed for the construction of a facility and that all districts included in the consortium approved such a bond issue.

It will not be sufficient for the consortium to prove that all participating districts have approximately the same tax base and that they joined together for that reason. Rather a consortium must prove that an excluded district received a genuine invitation to participate on terms comparable to those offered any other district, and that the offer was declined by the governing authority of the district. If a recipient fails to prove that the planning and formation stages were nondiscriminatory, it will be required to give the excluded district an opportunity to participate in the consortium. Of course, the newly included district may be required to contribute financially and otherwise on the basis of an equitable formula and arrangement.

36. *Comment:* Consortia ask whether paragraph IV-F bars an equal allocation of a facility's student capacity among participating school districts if that allocation results in the disproportionate exclusion of minority group students. Comment No. 35 addresses an issue illustrated by the exclusion of a city school system from an essentially suburban consortium. The issue in this comment, is illustrated by a consortium of a majority black city school system and four majority white suburban districts that equally share a vocational education facility with a capacity of 500 students. Inequality results from this agreement if the city system's student enrollment is substantially greater than its suburban partners. Thus if each participant in this five district consortium is allocated 100 student spaces in the vocational education center, each suburban district may have only 1,000 students competing for 100 spaces while the city system may have 2,000 students competing for 100 spaces. Students in the city system do not have equal opportunity for admission to the vocational education center.

Response: This provision (IV-F) applies to both separate school districts and consortia. However, a consortium may allocate available spaces in the manner described in this comment if it proves that compelling reasons similar to those discussed in comment 35 above, justify the allocation.

37. *Comment:* Commenters asked whether paragaph IV-C may result in a requirement that a school district admit to its vocational education facilities students who reside in an entirely separate school district.

Response: Paragraph IV-C and IV-F apply primarily to discrimination within a school district and to consortia as discussed in comments 35 and 36. A legally consitituted separate school district providing vocational education only to students residing within its borders is not required by paragraph IV-C to admit nonresident students. However, in the event a State establishes a "vocational education district" composed of several school districts, the boundaries of the vocational education district are subject to review under paragraph IV-C.

38. *Comment:* Commenters objected that paragraph IV-H was unreasonable and unrealistic in presuming that segregated facilities, courses and programs resulted from recipient practices rather than student choice Others urged that the paragraph contain an additional specific presump-

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tion of unlawful discrimination if a school were established for members of one race, sex or national origin and continues to be so attended. Such commenters asked for a rule holding that the only permissible remedy for segregation in such a school is relocation of courses and programs to other schools.

Response: Both comments have some merit and have led to a rewriting of the paragraph. Vocational education administrators are quite correct in arguing that specific vocational courses and programs are generally elected by, not required of, students. Consequently, segregation may result from parental, community and peer group influences that are beyond their control. This fact is generally recognized by Section IV of the Guidelines: each paragraph identifies a method or factor controlling student eligibility *other than student choice* and attempts to provide protection against the unlawful exclusion of students based upon that factor. Thus, a student's ineligibility based upon residence (paragraph IV-C) or because the facility was located too far from his or her home (paragraph IV-B) or because he or she scored too low on an admissions test (paragraph IV-K) is addressed by the Guidelines. Proposed paragraph IV-H departed from this theme. Rather than identify a specific device that resulted in the exclusion of students despite their desire to enroll, the paragraph proposed a presumption of unlawful discrimination whenever a facility or course was segregated. This was unreasonable, and the general presumption has been deleted.

However, the other commenters are also correct in stating that the Guidelines fail to identify another factor or device that can interfere with a student's choice. A recipient may have constructed a facility for members of one race or sex and may not have taken meaningful action to remedy the segregation. In such cases, it is unreasonable to state that the school continues to be segregated as a result of student choice. The analogy to racial segregation in elementary and secondary public schools is perfect: by the late 1960's Federal courts were consistently holding that school officials were not adequately desegregating their dual racial systems when, after 100 years of enforced segregation, they merely opened the doors of their white schools and announced that black students could apply for admission. Paragraph IV-H has accordingly been rewritten to hold that if a facility was established for minorities, or for one race, national origin or sex and it continues to be essentially segregated despite open enrollment, additional steps to desegregate the facility are necessary. However, the suggestion that a specific remedy should be required of a school established as a segregated facility, is not accepted. The efficacy of any proposed remedy will vary from case to case.

39. *Comment:* Commenters stated that there should not be a violation of paragraph IV-H if a protected group is represented in a facility in proportion to its representation in the service area.

Response: This comment is accepted. Evidence that members of a protected group attend a facility in proportion to their representation in the service area will be accepted as evidence of that group's nondiscriminatory enrollment in the facility. However, the boundaries of the service area must satisfy the requirements of paragraph IV-C.

40. *Comment:* Commenters suggested that in paragraph IV-H underrepresentation, not nonparticipation, should be the standard; that discrimination based on national origin was improperly omitted from paragraphs IV-F and IV-H.

Response: These suggestions merely urge consistency among several provisions and identify inadvertent errors. The suggested changes have been made.

41. *Comment:* Commenters urged that handicapped persons be protected by paragraph IV-H.

Response: A vocational education center, branch or annex enrolling only handicapped students is often permissible under the Department's Section 504 regulation (e.g. a school for autistic children). Each secondary level student must be individually evaluated and then assigned to a program responsive to his or her individual needs. For this reason the presumption recognized in paragraph IV-H cannot routinely protect handicapped persons. Nevertheless, under the requirements of paragraphs IV-N and VI-A, secondary level handicapped students may be placed in segregated annexes, branches or centers only if their individualized education plans state that they cannot be trained in a regular program with "supplementary aids and services."

42. *Comment:* Commenters suggested that the proposed validation standard of paragraph IV-K would permit recipients to use criteria that disproportionately exclude minorities or handicapped persons merely by demonstrating that the students admitted were more likely to succeed in the program. This would allow recipients, for example, to exclude protected persons from the attractive trade and technical programs through evidence that a "C" average student is less likely to excel in a program than an "A" average student. The commenters suggested that screening criteria to be permissible, must be "essential to participation" in a program.

Response: This suggestion is accepted. One of the principal objectives of the Vocational Education Act is to provide protected group persons the training they need to obtain employment. Screening criteria or standards that have the effect of disproportionately excluding such persons from vocational education programs must therefore be validated as essential to satisfactory completion of course requirements. The use of criteria like grade point average, to justify priority admission of students with exceptional attainments or scores may disproportionately exclude protected group persons. If such disproportionate exclusion occurs the criteria or standards must be validated as essential to participation in a program *before* they may be used by a recipient.

43. *Comment:* Commenters sought to expand paragraphs IV-L and IV-M. They argued that recipients should be required to provide native language programs, English language instruction and other diverse methods of instruction where there are high concentrations of persons with limited English language skills.

Response: The changes proposed are beyond the scope of the Guidelines project. The requirements of the Guidelines are consistent with established Office for Civil Rights secondary school policy.

44. *Comment:* Commenters objected to the failure of paragraph IV-D, (I) and (M) (now E, I, and M) to include deadlines for the submission of acceptable remedial plans.

Response: The Office for Civil Rights will establish time periods for the submission of remedial plans on a case by case basis.

45. *Comment:* Commenters thought the public notification paragraph, IV-O, fails to ensure adequate notice of vocational education opportunities. Others thought the proposed provision was too burdensome; they found the requirement of notice to limited English proficiency persons particularly objectionable.

Response: The requirement that recipients announce a policy of nondiscrimination has several components: 1) the notice must be continuing; 2) it must be designed to reach a recipient's beneficiaries and employees, and potential beneficiaries and employees, particularly members of protected groups; 3) it must state the policy of nondiscrimination; 4) it must include the name, telephone number, and address of a person who can provide additional information on the policy of nondiscrimination. The proposed provision for notification was deficient with respect to requirement number 4;

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the final Guidelines have been revised accordingly.

The Department agrees with the commenters who found too onerous the requirement of notice of "all program offerings and admissions criteria." It has been substantially revised. Also, notice to national origin minorities with limited English speaking ability is now required only if a service area contains a "community" of such persons.

46. *Comment:* Commenters asked whether affirmative action programs were permissible or required.

Response: Appropriate remedial action (sometimes referred to as "affirmative action") must be undertaken to overcome the effects of past discrimination. Also, certain voluntary affirmative action measures are permissible under the Department's Title VI, Title IX, and Section 504 regulations, when a recipient finds such measures useful or necessary to correct societal discrimination or patterns of segregation and nonparticipation. the Secretary and the President have issued statements urging recipients to adopt and continue voluntary affirmative action programs in admissions, recruitment, counselling, and employment.

47. *Comment:* A commenter asked whether children attending private racially discriminatory academies may also attend Federally assisted vocational schools.

Response: On April 26, 1976, the Office for Civil Rights announced that "children enrolled in a non-public school cannot participate in the public school program if the non-public school engaged in discriminatory practices prohibited by Title VI. Even though the non-public school is not a recipient, any discriminatory practices by it would . . . directly affect the Federally assisted program." 41 F.R. 35553 (August 23, 1976).

SECTION V—COUNSELING AND PREVOCATIONAL PROGRAMS

48. *Comment:* Commenters recommended that recipients be required to provide inservice training for counsellors on the needs of minorities, the handicapped, and students stereotyped on the basis of sex.

Response: Inservice training is an approved method for instructing professional staff on the forms of discrimination experienced by students. However, recipients may obtain compliance through other methods.

49. *Comment:* Proposed paragraph V-B provided that disproportionate enrollments based on sex must be examined to verify that they do not result from discrimination in counselling. Commenters asked that disproportionate enrollments based on race or national origin lead to a similar examination of counselling practices.

Response: The suggestion is accepted and paragraph V-B has been revised.

50. *Comment:* Commenters urged that paragraph V-E endorse affirmative promotional and outreach activities.

Response: The recommendaton is accepted. Voluntary affirmative action in promotional and counselling activities is endorsed through comment number 46.

51. *Comment:* Commenters found "unrealistic" the prohibition against counselling handicapped students toward limited career objectives (paragraph V-B).

Response: This provision allows a recipient to advise handicapped students of the difficulties they may encounter in fields not traditionally opened to them. However, the provision requires that recipients do more than merely state that such obstacles exist. The recipient must provide students with information on available vocational opportunities, on the responsibilities of an employer under Section 504, and on available remedies in the event of discrimination. Information or materials that may assist recipients in meeting this responsibility are available from the Office for Civil Rights, Office of Program and Review and Assistance.

SECTION VI—EQUAL OPPORTUNITY IN THE VOCATIONAL EDUCATION INSTRUCTIONAL SETTING.

52. *Comment:* Commenters recommended several changes to this section: A) "Mainstreaming" handicapped students should not be a priority; B) Sex restricted financial assistance, even subject to the conditions specified in paragraph VI-B, should be impermissible; C) Additional detail should be provided in paragraph VI-C to provide protection against unlawful discrimination; D) A new section should be added to announce recipient obligations to national origin minority persons with limited English speaking ability.

Response: The primary purpose of Section VI of the Guidelines is to record several provisions of the Department's Title IX and Section 504 regulations that deserve emphasis in light of findings in OCR compliance reviews and complaint investigations. Proposed changes "A" and "B" are inconsistent with the Department's regulations and therefore beyond the scope of the Guidelines project; suggestion "C" is meddlesome in that it seeks to regulate recipients aimlessly; proposed change "D" seeks a provision already included in another section of the Guidelines.

SECTION VII—WORK STUDY, COOPERATIVE VOCATIONAL EDUCATION, JOB PLACEMENT, AND APPRENTICE TRAINING

53. *Comment:* Commenters argued that the requirements of Section VII are too burdensome. They believe that Congress never intended recipients to monitor employers and unions for discrimination.

Response: Vocational education administrators misperceive the nature of Section VII requirements. Under the Department's civil rights regulations recipients are prohibited from engaging in any service, activity, or program in a discriminatory manner. Work study, cooperative education, and job placement are recipient programs or activities and for this reason may not be marred by unlawful discrimination. There is evidence, for example, that school officials are honoring requests from employers for persons of a particular race or sex or for persons free of handicaps. This is unlawful discrimination by both the recipient and the employer. Moreover, the Congress is not mindless; it does not enact idle legislation. It would not appropriate more than a half billion dollars annually under the Vocational Education Act for both nondiscriminatory job training programs and discriminatory job placement programs.

54. *Comment:* Commenters suggested that the Guidelines require recipients to obtain an assurance of nondiscrimination from employers that participate in cooperative education, work study, and job placement programs. Others suggested that paragraph VII-A should require school officials to collect, review, and maintain data reflecting the race, sex, national origin, and handicap of students participating in these programs.

Response: The addition of a written assurance to existing written agreements (e.g., cooperative vocational education agreements) is a reasonable and useful measure. This requirement has been added to the Guidelines. To date, OCR investigators have not been frustrated by inadequate recipient records, and the data collection suggestion is therefore not accepted.

55. *Comment:* Commenters urged that paragraph VII be rewritten to allow potential employers to discriminate on the basis of handicap if the handicap prevents a person from performing the job. One commenter stated, for example, that a roofing company need not hire an individual with no legs as a roofer since the job requires an ability to climb a ladder carrying 90 pounds of materials.

Response: Employers may not discriminate on the basis of handicap against otherwise *qualified* handicapped persons. Prospective employers are permitted to make preemployment

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inquiries into an applicant's ability to perform job-related functions. Note, however, that employers are required to "reasonably accommodate" the special needs of a handicapped employee or applicant for employment if it does not result in an "undue hardship" for the employer. In the example provided by the commenter, a small roofing concern would probably be unduly burdened by the accommodation necessary for this handicapped person. However, in contrast, a major university will not experience "undue hardship" if it provides a reader for a blind applicant for employment. See paragraph VIII-E of the Guidelines. Additional information on the principles of "undue hardship" and "reasonable accommodation" can be obtained from the Office for Civil Rights, Office of Program Review and Assistance.

56. *Comment:* Commenters objected to the phrasing in paragraph VII-A suggesting that a recipient must control an employer's policies and practices.

Response: A recipient cannot control the policies or practices of an employer. However, a recipient must determine whether an employer discriminates and if necessary divorce itself—its programs and activities—from the discriminating employer.

57. *Comment:* Commenters asked whether recipients are prohibited from entering work study and cooperative education agreements with employers that have remedied their discriminatory policies and practices.

Response: Recipients are free to enter into agreements with such employers.

58. *Comment:* A commenter argued that prospective employers in cooperative placement activities should not be covered by these Guidelines because they are "ultimate beneficiaries" under 45 CFR § 84.3(f).

Response: The requirements of the Guidelines apply to recipients of Federal funds, not to prospective employers. Recipients must take measures to free their programs and activities of employers who unlawfully discriminate. It is unnecessary, therefore, to determine whether prospective employers are "ultimate beneficiaries."

59. *Comment:* Commenters asked whether the requirement of nondiscrimination in apprentice training applies only to programs sponsored by unions.

Response: Paragraph VII-B applies to registered and non-registered apprentice training programs whether sponsored by a union, an individual employer, a group of employees, an employer-employee committee, or a governmental agency. The text of paragraph VII-B has therefore been revised to cover a "labor union or other sponsor." Also, all sponsors of apprentice programs are subject to the Department of Labor Guidelines for Nondiscrimination in All Apprenticeship Programs (29 CFR Part 30).

Section VIII—Employment of Faculty and Staff

60. *Comment:* Commenters argued that the Department's Title VI employment jurisdiction extends only to employees who work directly with students. They state that the Department has no authority to act on complaints of employment discrimination against "administrators or applicants for employment."

Response: The Guidelines have been revised to reflect the Department's current interpretation of its authority. If and when it is revised or modified, the new policy will be announced and will supersede the Guidelines.

61. *Comment:* Commenters stated that the Department has no authority to accept or resolve employment discrimination complaints under Title IX.

Response: The Guidelines reflect the Department's current interpretation of its authority. Several cases raising this issue are now pending in the courts of appeal. If and when this litigation results in controlling holdings that the Department has no employment jurisdiction under Title IX, the Department's regulations and these Guidelines will be revised.

62. *Comment:* Commenters suggested that under a recent decision of the United States Court of Appeals for the Fourth Circuit, *Trageser* v. *Libbie Rehabilitation Center*, — F.2d — (4th Cir. 1978), the Department has no authority to accept or resolve employment discrimination complaints under Section 504.

Response: The Guidelines reflect the Department's current interpretation of its authority. If and when it must be revised to conform to controlling judicial decisions, the new policy will be announced and will supersede the Guidelines.

63. *Comment:* Commenters stated that the definition of a "qualified handicapped" person under Section 504 of the Rehabilitation Act and the Guidelines is at odds with the Department of Labor's definition under Section 503 of the Rehabilitation Act.

Response: The Department of HEW is presently reviewing with the Department of Labor the inconsistencies between their definitions. The Guidelines reflect the Department's current view. If and when it is revised or modified, the Department's regulation and these Guidelines will be revised.

64. *Comment:* Commenters objected to paragraph VIII-F on the ground that it establishes requirements inconsistent with *Bakke.*

Response: The Guidelines require remedial action to overcome the effects of past discrimination. *Bakke* permits, among other activities, such "affirmative action."

65. *Comment:* Commenters objected to paragraph VIII-C as "presuming guilt" before an investigation is conducted.

Response: Although alternative language was considered, no change has been made in the Guidelines. It is not the intention nor the effect of the Guidelines to make baseless presumptions or findings. Rather, statistical patterns result in inferences that additional evidence may rebut. The Office for Civil Rights will not find unlawful discrimination solely on the basis of statistical data or without affording a recipient an opportunity for rebuttal.

66. *Comment:* Commenters urged that the Guidelines require recipients to maintain and submit data on its employment practices.

Response: This suggestion was rejected. Records maintained and submitted by recipients under other authorities have satisfied the needs of OCR investigators.

67. *Comment:* Commenters asked whether this section applies to State agencies.

Response: All recipients of Federal financial assistance from the Department, as specified in Section I, are covered by Section VIII. This also explains the requirement of paragraph II-A(4).

68. *Comment:* Commenters stated that paragraph VIII-C should recognize that a recipient may rebut a presumption of unlawful employment discrimination through evidence that qualified persons of a protected group were not available to the individual school district nor to the vocational education center.

Response: Rebuttal evidence may include proof that: (1) Members of a protected group were recruited without success; or (2) Identified persons of a protected group were offered employment opportunities that were declined.

Section IX—Propriety Vocational Education Schools

69. *Comment:* A commenter argued that a tuition grant or loan to a student in attendance at a proprietary school is not Federal financial assistance to the proprietary school. Rather it is compensation paid for a direct service—a "procurement contract." It is argued that proprietary schools are therefore not subject to the Department's regulations or these Guidelines.

Response: The Department has long defined the term "recipient" under Title VI, Title IX and Section 504 to include proprietary (i.e., other than

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public or nonprofit) educational institutions that receive tuition from students participating in Federal tuition grant programs. It is beyond the scope of the Guidelines project to reconsider established Department policy.

David S. Tatel,
Director,
Office for Civil Rights.

March 15, 1979.

[FR Doc. 79-8561 Filed 3-20-79; 8:45 am]

☆U.S. GOVERNMENT PRINTING OFFICE: 1979 281-241/5005 1-3

APPENDIX B

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

July 1979

MEMORANDUM FOR CHIEF STATE SCHOOL OFFICERS
EXECUTIVE OFFICERS OF STATE BOARDS
OF VOCATIONAL EDUCATION
STATE DIRECTORS OF VOCATIONAL EDUCATION
CHAIRPERSONS, STATE ADVISORY COUNCILS
FOR VOCATIONAL EDUCATION

SUBJECT: Procedures for Preparing the Methods of Administration
Described in the Vocational Education Guidelines

The Office for Civil Rights (OCR) issued "Guidelines for Eliminating Discrimination and Denial of Services on the basis of Race, Color, National Origin, Sex and Handicap in Vocational Education Programs" on March 21, 1979 (44 Fed. Reg. 17162-17175 (March 21, 1979)). Section II(C) of the Guidelines states that the State agency responsible for the administration of vocational education must submit to the Department "the methods of administration and related procedures" it will follow in carrying out its civil rights obligations under the Guidelines. The Methods of Administration (MOA) must be submitted to the Bureau of Occupational and Adult Education (BOAE) in the Office of Education before March 21, 1980.

The purpose of this memorandum is to provide guidance to State agencies in the preparation of their Methods of Administration. BOAE will review, comment, and recommend approval or disapproval of each State agency's MOA before forwarding it to OCR for a final determination of acceptability. In reviewing a State's overall attention to civil rights compliance in its administration of vocational education and in conjunction with review of the Methods of Administration, BOAE and OCR will examine the descriptive material already provided in the State's General Application, Five-Year State Plan, Annual Program Plan, and the Annual Accountability Report.

GENERAL REQUIREMENTS

The MOA must address the civil rights responsibilities stated in Section II of the Guidelines. Section II sets forth the Department's policy regarding the legal obligation of State agencies for oversight of compliance with Federal civil rights laws by subrecipients offering or administering vocational education programs. To meet that obligation, State agency recipients must carry out a number of administrative measures and must, in addition, give close attention to the effects of State level decisions on policies and procedures.

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Section II(A) of the Guidelines prohibits State agency recipients from directly taking any action that leads to discrimination on the basis of race, color, national origin, sex, or handicap. The four general areas to which this prohibition applies are: (1) the establishment of criteria or formulas for distribution of Federal or State funds to vocational education programs; (2) the establishment of requirements for admission to or requirements for the administration of vocational education programs; (3) the approval of action by local entities (subrecipients) providing vocational education; and (4) the conduct of their own programs.

Section II(B) of the Guidelines directs the State agency to adopt a compliance program to prevent, identify, and remedy discrimination on the basis of race, color, national origin, sex, or handicap by subrecipients. The compliance program must include four major components: (1) collecting and analyzing civil rights-related data and information that subrecipients compile for their own purposes or that they submit to State and Federal officials under existing authorities; (2) conducting periodic compliance reviews of selected subrecipients; (3) providing technical assistance upon request to subrecipients; and (4) periodically reporting the State agency's activities and findings to the Office for Civil Rights.

The following are possible funding sources that may be used to carry out State agency responsibilities under the Guidelines (see Comment 11, Fed. Reg. 17169):

1. Federal funds for State and local administration — (Sec. 120(b)(1)(0) and Sec. 130(b)(7) from appropriations available under Sec. 102(a));
2. Federal funds available for planning and data collection from appropriations available under Sec. 102(d);
3. State and local matching and maintenance of effort funds.

The attached document contains recommendations for the contents of each part of the MOA. Use of the suggested format is recommended, not required. Any format that covers all essential elements of the State agency's responsibilities under the Guidelines will be acceptable. We have tried to indicate, by use of the auxiliary verb "must," those elements of content that have to be included in the Methods of Administration, regardless of the format that is used.

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Additional materials that may be helpful in developing the details of programs for conducting agency level and on-site reviews of subrecipients, such as the manuals that OCR uses in its own enforcement activities, may be obtained from the appropriate regional office of OCR. A list of the regional offices and the States they cover is enclosed.

If we may be of further assistance, please do not hesitate to contact us.

Daniel B. Dunham
Deputy Commissioner for
Occupational and Adult Education
Office of Education

David S. Tatel
Director
Office for Civil Rights

Enclosures

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METHODS OF ADMINISTRATION FOR COMPLYING WITH CIVIL RIGHTS REQUIREMENTS IN VOCATIONAL EDUCATION PROGRAMS

July 1979

Issued by:

Department of Health, Education, and Welfare

Bureau of Occupational and
Adult Education
Office of Education

Office for Civil Rights

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PART ONE - INTRODUCTORY INFORMATION

1-A. Development of the Methods of Administration (MOA)

This subpart must describe briefly the process by which the MOA were developed. It should respond to these general questions:

- Which component (division, staff office, bureau) was assigned principal agency responsibility for developing the MOA?

- Which State agencies other than the lead agency participated in the development of the MOA? For example, did the State civil rights agency participate in their development?

- Which advisory groups were involved and to what extent? For example, were the MOA developed by the State education agency alone, or were other groups involved, such as those described in Section 107 of the Vocational Education Amendments?

1-B. Approval of the Methods of Administration

This subpart must describe briefly the process by which the MOA were reviewed and/or approved by the State before submission to the Department of Health, Education, and Welfare. It should indicate the title of each official who was designated to review and/or approve the MOA prior to submission. For example, if the MOA were referred to legal counsel or to the State Attorney General for review and/or approval, this should be stated.

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PART TWO - ORGANIZATION TO MEET CIVIL RIGHTS RESPONSIBILITIES

This part must describe the State agency's organization and administration of its civil rights compliance program for vocational education, as required under Section II of the Guidelines.

2-A. Organization of Compliance Activities

This subpart must describe how the State agency will administer its compliance program. It should state the administrative entity that will direct the activities of the compliance program (for example, the Division of Vocational Education of the Department of Education, the Office of Equal Education Opportunity of the Department of Education, the State Commission on Human Rights).

The MOA should describe the official position of the person directing the civil rights compliance program and his or her line of authority to the Director of the State agency. Although the Sex Equity Coordinator may be highly qualified to accept these administrative responsibilities, he or she cannot be given these responsibilities in addition to present activities because the regulations implementing the Vocational Education Act require the Sex Equity Coordinator to devote full time to sex equity responsibilities. However, Sex Equity Coordinators may perform coordinative activities with regard to their own statutory functions (Sec. 104(b) of the VEA; 45 CFR 104.71 et seq.). In addition, we recommend that the Title IX Coordinator and the Section 504 Coordinator, and any other coordinators the State agency may have working on programs for disadvantaged or handicapped students, be included in the plans for developing and implementing compliance activities.

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The organizational plan should be directed at accomplishing the three major tasks for which the State agency has responsibility: the review of internal policy; the development of a civil rights compliance program; and the development of technical assistance activities. Great care should be given to developing and describing the administrative structure to be used in accomplishing these tasks.

2-8. Personnel Assigned to Implement the Compliance Program

This subpart must give the name, position title, office component, address, and telephone number of the person or persons assigned to carry out the State agency's civil rights compliance program.

PART THREE - REVIEW OF STATE POLICIES AND PROGRAMS

This part must describe the procedures the State agency will follow in determining whether it is complying with the requirements set forth in Section II(A) of the Guidelines.

3-A. Conduct of the State Policy Review

The Methods of Administration must show how the State agency will determine whether its policies and procedures are free from unjustified discriminatory effects. The MOA must outline the policies and procedures the State agency plans to review in the following areas: (1) the establishment of criteria or formulas for distribution of Federal or State funds to vocational education programs in the State (for example, does the formula for the distribution of State funds adversely affect the distribution of Federal funds?); (2) the establishment of requirements for admission to or requirements for the administration of vocational education programs (for example, to the extent that the State reviews admissions policies of area vocational schools, are these policies analyzed in terms of the requirements of Title VI, Title IX, and Section 504?); (3) the approval of action by local entities providing vocational education (for example, in approving a local application request for construction funds, does the State review the application to determine whether programs will be accessible to handicapped students?); and (4) the conduct of their own programs (for example, are guidance and counseling materials used in State-operated institutions reviewed for compliance with Title VI, Title IX, and Section 504?).

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Under this subpart, the MOA must identify the administrative office designated to review the policies and procedures for the purposes described. In addition, State agencies should request (and the MOA should specify) a review of the policies by the Office of the State Attorney General or by the counsel for the State Board of Vocational Education.

The review of policies and procedures should be based on the relevant provisions of the Guidelines. For example, the State policies affecting the criteria or formulas for distribution of Federal or State funds should be reviewed for compliance with the provisions of Section III (A)-(E). State policies affecting requirements for admissions and administration, and procedures for approving actions by local recipients should be reviewed for compliance with Sections IV, V, VI, VII, VIII, and where applicable, Section IX. Policies and procedures affecting a State agency's operation of its own programs (including State-operated institutions) should be similarly reviewed.

3-B. Scheduling the Policy Review

The MOA must provide for an initial review of State policies and procedures under Section II(A) of the Guidelines by July 1, 1980, and for submission of the results in the annual report described in Part 5 of this document. In addition, the MOA must provide that the State agency will conduct subsequent reviews and report the results in the annual report whenever there have been significant changes in policies or procedures that could affect civil rights compliance.

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3-C. Review of State-Operated Institutions and Programs

The MOA must describe the system and schedule by which the State agency will determine whether State-operated institutions and programs are complying with the Guidelines. For review of their own institutions, State agencies may wish to adopt a two-tiered system of review similar to that which is described for subrecipient programs in Part 4 of this document.

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PART FOUR - ENSURING COMPLIANCE BY SUBRECIPIENTS

4-A. Statement of Objectives

This subpart of the MOA must set out in sufficient detail the State agency's plans for fulfilling its obligations under Section II(B) of the Guidelines to ensure that its subrecipients are complying with the civil rights laws. In brief, Part 4 should outline a program that includes procedures for identifying existing discrimination through a combination of periodic review of data and information describing subrecipients' operations and first-hand observation of subrecipients' programs through on-site visits (see subparts (B) and (C) below); procedures for preventing discrimination through the provision of technical assistance to subrecipients (see subpart (D) below); and procedures for discussing voluntary corrective action with subrecipients who are found to be discriminating (see subpart (E) below).

The material that follows provides some suggestions for structuring the various aspects of the State agency's program (for example, how frequently subrecipients should be reviewed and how subrecipients should be selected for review). It will be up to each individual State agency to determine the details of its program for assisting and monitoring its subrecipients.

4-B. Identification of Possible Subrecipient Violations Through Agency Level Reviews

The agency level review, or desk audit, is an analysis of data and documents relating to subrecipients. It provides a relatively quick and simple way for making a threshold determination of whether a subrecipient is complying with civil rights laws without going on-site.

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While this type of review will not uncover every kind of violation (for example, it will not show whether there are barriers that prevent access to programs by handicapped students), it will give a good overall idea of whether a subrecipient is meeting its civil rights obligations.

B-1. Number of Reviews Per Year

The MOA must provide for an agency level or desk audit review of at least 20 percent of all subrecipients each year. This means that each subrecipient will be the subject of an agency level review every five years, except where a subrecipient is already the subject of legal proceedings resulting from alleged discrimination (see Part 4-B-2, below). We believe that a review of 20 percent each year will allow the State agency to scrutinize subrecipients' operations at reasonable intervals and will not be an unreasonable burden.

B-2. Selection of Subrecipients for Review

The MOA must describe a method for determining which subrecipients will be the subject of agency level reviews in a given year. The method must be designed to reach, at the earliest possible date, those subrecipients most likely to have compliance problems. The following selection system is suggested:

— Beginning with a pool composed of all subrecipients, omit:

- those previously reviewed (if any) in the five-year cycle;
- those that are the subjects of pending litigation in Federal or State courts because of alleged discrimination on the basis of

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race, color, national origin, sex, or handicap; and

- those that are the subjects of pending or recent investigations or enforcement proceedings by OCR.

— From the remaining pool, choose 20 percent of the total number of subrecipients (or more, if the MOA provide for agency level review of more than 20 percent each year) using the following factors to determine which subrecipients are most in need of immediate review:

- knowledge of a subrecipient's practices that raise potential civil rights compliance problems;
- reports of possible noncompliance obtained from complaints filed by parents, students, civil rights groups, or others;
- reports from State civil rights agencies or State advisory committees that raise questions about potential civil rights compliance problems;
- information or reports on subrecipients from OCR that indicate possible compliance problems.

B-3. Conducting the Reviews

a) Sources of Information to Be Examined

It should be possible for the State agency to conduct the agency level review of subrecipients using data and documents already in the possession of the State agency. The MOA should specify the data and documents to be used. Because subrecipient enrollment data by race/ethnicity, sex, limited English-speaking ability, and handicap are essential to conduct the review, the State should use as its primary data source the subrecipient information collected for the Vocational Education Data System (VEDS). The following are some additional suggested sources of information:

(1) Program evaluations conducted by the State under Section 112 of the Vocational Education Act (45 CFR 104.401 et seq.).

(2) Program evaluations conducted by State Advisory Councils under Section 105(d) of the Vocational Education Act (45 CFR 104.93 (c)).

(3) Data on the status of male and female students and employees in vocational education collected by full-time personnel pursuant to Section 104(b)(1)(A) of the Vocational Education Act (45 CFR 104.75(b)).

(4) Data used by the State to prepare the annual accountability report, particularly regarding compliance with the equal access provision contained in Section 108(b)(1)(C) of the Vocational Education Act (45 CFR 104.222(f)).

(5) Copies of the Elementary and Secondary School Civil Rights Survey forms collected by the Office for Civil Rights for fall 1976. The School System Summary Forms (OS/CR 101), copies of which were provided to each State education agency, contain data on vocational enrollments by race/ethnicity and sex for each local education agency.

(6) Copies of the Elementary and Secondary School Civil Rights Survey forms collected by the Office for Civil Rights for fall 1978.

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(7) The Office for Civil Rights Vocational Education Survey for 1979, copies of which will be forwarded to each State education agency. This survey will include program enrollments by race/ethnicity, sex, and handicap for education institutions offering at least one vocational program.

(8) Data and information generated pursuant to State requirements.

(9) Information derived from complaints or reports from consumer groups, public agencies, parents, or students.

(10) Letters of Findings (LOFs) issued by OCR.

(11) Information derived from annual applications submitted by subrecipients including:

(a) agreements or contracts among subrecipients for the creation of a consortium to provide vocational education.

(b) applications for the construction of new facilities, including renovations.

(12) Descriptions of the geographical service areas of subrecipients.

(13) Information on apprentice programs.

b) Analysis of Information

The MOA must describe the kinds of information that will be drawn from the source materials as indicators of whether or not the subrecipient is meeting its civil rights obligations. Among the kinds of information that could be drawn from the data and documents listed above are the following:

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(1) The total enrollment by race, color, national origin (including students of limited English skills), sex, and handicap of each vocational education center (including branches and annexes) operated by the subrecipient.

(2) The enrollment by race, color, national origin (including students of limited English skills), sex, and handicap in each vocational education program, as defined by a sequence of courses leading to an occupational objective.

(3) An estimated percentage of minorities (including those of limited English skills) and handicapped persons in the general population of the vocational education center's service area.

(4) The enrollment by race, color, national origin (including students of limited English skills), sex, and handicap of each sending (feeder) school whose students attend a vocational education center (or Area Vocational Education School).

(5) The administrative and instructional staff (excluding names) by race, color, national origin, sex, handicap, and program for each vocational education center.

(6) The per-pupil allocation of Federal and State funds with respect to the proportion of minority students in vocational education programs.

(7) Participation by race, color, national origin (including students of limited English skills), sex, and handicap in apprentice-related programs.

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B-4. Notification of Subrecipients

The MOA should provide for notification of subrecipients at two points:

a) At the Commencement of the Review

The subrecipient should be notified that it has been selected for agency level review. The notice should be sent at least 30 days prior to the start of the review and should provide information on how the review will be conducted. It should also ask the recipient to cooperate in the review by providing any additional relevant documentation not in the possession of the State agency.

b) At the Conclusion of the Review

Following completion of all agency level reviews and a determination of which subrecipients will be scheduled for on-site reviews (see Part 4-C-2, below), each subrecipient should be notified: (1) that because no violations were shown by the review, there will be no on-site review of the subrecipient that year; but the subrecipient has a continuing obligation to ensure that its programs are operated in compliance with civil rights requirements and may be reviewed by OCR during the year; (2) that although the agency level review revealed no apparent problems, the subrecipient will nevertheless be the subject of an on-site review; or (3) that the agency level review revealed some possible violations (to be listed) and that these specific problem areas, as well as a general review of the subrecipient's operations, will be the subject of an on-site review.

B-5. Timetable

The MOA must specify when each phase of the agency level review process will take place. The following is a suggested schedule, based on the assumption that July 1 will be the date that annual reports of

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compliance activities will be submitted to HEW (see Part 5, below), and taking into account the need to allow sufficient time, following agency level reviews, to conduct on-site reviews and, where necessary, to negotiate for voluntary compliance (see Parts 4-C and 4-E, below):

July: selection of subrecipients for review and notification.

August: culling of information from available sources and preparation of a file on each subrecipient being reviewed.

September: analysis of information on each subrecipient being reviewed.

November: notification of subrecipients of results of reviews.

4-C. Identification of Subrecipient Violations Through On-Site Reviews

Although on-site reviews provide a greater opportunity for investigating apparent violations of civil rights laws than do agency level reviews and for reaching kinds of discrimination that might not come to light during an agency level review, they are also much more time-consuming. Periodic on-site compliance reviews of all recipients are therefore not required, as are periodic agency level reviews. Rather, the MOA must provide for on-site reviews of those selected subrecipients which, based on the agency level review, appear to have a higher probability of potential compliance problems. The MOA may also provide for on-site reviews of some randomly selected subrecipients as a means of identifying compliance problems that would be unlikely to surface during an agency level review.

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C-1. Number of Reviews Per Year

The number of on-site reviews shown to be necessary on the basis of agency level reviews will depend on the number of agency level reviews that reveal compliance problems; therefore, the number should fluctuate from year to year. In addition to indicating that all such necessary on-site reviews will be conducted, the MOA must also provide that, at a minimum, 25 percent of those subrecipients that were reviewed at the agency level (or 5 percent of all subrecipients) will be the subject of on-site reviews. This will provide an opportunity, in those instances where less than 25 percent of the agency level reviews show apparent violations, to spot-check other subrecipients for more subtle problems.

C-2. Selection of Subrecipients for Review

The MOA must provide for on-site review of all subrecipients for which the agency level review indicates compliance problems. Among the agency level findings that should trigger an on-site review are:

(1) Secondary or postsecondary vocational education centers that enroll students of one race in substantially greater proportion than their representation in the center's service area.

(2) Vocational education centers that enroll students of one sex in substantially greater proportion than their representation in the center's service area.

(3) Centers that enroll only a small percentage of handicapped students.

(4) Centers in which most of the programs enroll students of one race, color, national origin, or sex, or a large or small proportion of

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handicapped students.

(5) Center branches or annexes that enroll students of one race, national origin, or sex in substantially greater proportion than their representation in the service area.

(6) Centers in which enrollments in apprentice training, work study, or cooperative education are exclusively or disproportionately of one race, color, national origin, or sex, or in which a small proportion of handicapped students are enrolled.

(7) Centers in which there is significant underrepresentation or overrepresentation of faculty or staff on the basis of race, color, national origin, sex, or handicap.

(8) The school systems comprising a consortium to establish an area vocational education school (AVES) have predominantly nonminority student bodies, while a contiguous school system that is not part of the consortium enrolls a predominantly minority student body. (See Section IV(C)(1) of the Guidelines.)

(9) Minority students are denied eligibility to attend a vocational center because they do not reside within its service area. However, they reside closer to the center than eligible nonminority students living within the service area. (See Section IV(C)(2) of the Guidelines.)

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(10) The overall vocational education program of a vocational education center enrolling predominantly nonminority students offers, in comparison to the overall program of a center in a contiguous school system or service area enrolling predominantly minority students, a broader curriculum and better career opportunities. (See Section IV(C)(3) of the Guidelines.)

The MOA must provide, further, that if the subrecipients thus selected for on-site reviews do not equal 25 percent of those selected for agency level reviews, the balance will be made up of randomly selected subrecipients from the pool of those reviewed at the agency level in that year.

C-3. Conducting the Reviews

The MOA must specify the ways in which the on-site reviews will go beyond the agency level review in at least two basic areas:

a) Compliance Problems Indicated by the Agency Level Review

The MOA must describe in general terms the lines of inquiry that will be pursued to determine whether a problem identified during the agency level review is the result of unlawful discrimination or of other factors. For example, where an agency level review reveals a disproportionately low enrollment by minority students in highly desirable vocational training programs, inquiry should be made through examination of the subrecipient's guidance and counseling procedures and application records to determine whether this is the result of discrimination.

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State agencies should derive from the Guidelines other possible lines of inquiry.

b) Problem Areas Not Addressed in the Agency Level Review

Those areas in which problems can best be determined on the basis of an on-site review must be noted in this section of the MOA. Examples of problem areas that might be noted for coverage during an on-site review are:

(1) discriminatory faculty assignments;

(2) failure to provide access for handicapped students to programs;

(3) procedures used for notifying the public of the subrecipient's nondiscriminatory policies and practices;

(4) numerical limitations for admission of students to vocational education centers or programs;

(5) criteria for admission to vocational education centers and vocational programs where admission depends on, for example, past academic performance, record of disciplinary infractions, counselors' approval, teachers' recommendations, interest inventories, high school diplomas, or standardized tests;

(6) relationships with unions or other agencies providing training;

(7) programs for students with limited English skills;

(8) special provisions or programs for handicapped students;

(9) programs of financial assistance for students;

(10) provision of housing at residential vocational education centers.

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State agencies should derive from the Guidelines other possible problem areas.

In addition, the MOA must state that all agency level review findings of compliance will be verified during the on-site review.

C-4. Notification of Subrecipients

Procedures for notifying subrecipients that they are to be the subject of reviews have already been discussed above, in Part 4-B-4-a. The notice should indicate the date on which the on-site review will begin and should be sent at least 30 days prior to the start of the review. The MOA must further provide for written notification of each subrecipient (with a copy to the appropriate regional OCR office), at the conclusion of the on-site review, either that (1) no violations have been found (with a reminder of the subrecipient's continuing civil rights obligations and a statement to the effect that OCR may still wish to review the subrecipient) or (2) that violations have been found and the subrecipient will be given an opportunity to discuss the violations with the State agency and to submit a plan to remedy the violations voluntarily.

C-5. Timetable

The MOA must specify when each phase of the on-site review process will take place. The following is a suggested schedule, based on the assumption that the schedule set out in Part 4-B-5, above, will be followed for agency level reviews:

early November: notification of subrecipients selected for review.

December through end of June: conduct of on-site reviews and notification of subrecipients of on-site review findings.

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4-D. Use of Technical Assistance as a Means for Preventing Civil Rights Violations

The role of the State agency should be one of working with subrecipients to prevent discrimination, as well as detecting discrimination and seeking corrective action. It is very important for the State agency to have a well-defined technical assistance program, so that it can offer information and help to subrecipients that want to examine their current programs for possible civil rights violations or to plan future programs that are free from discrimination. The MOA must provide the following information about the technical assistance program:

(1) the nature and frequency of notification to subrecipients of the availability of technical assistance;

(2) the kinds of assistance that will be available (for example, advice on particular questions; overviews of subrecipients' total operations; dissemination of written materials; training sessions); and

(3) the numbers of people who will be assigned to technical assistance activities; and whether this will be their sole responsibility or whether they will be involved in review activities as well.

4-E. Obtaining Voluntary Compliance

A subrecipient shown by an on-site review to be in violation of the Guidelines in any aspect of its program must agree that it will take steps to eliminate the violations. Where violations cited in the letter of notification are minor and appear easy to correct, the subrecipient may describe the

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corrective measures and their implementation in correspondence with the State agency and request the agency's approval. However, if the violations are extensive or complex, the subrecipient must agree to submit to the State agency a voluntary compliance plan that describes in detail the steps it will take to eliminate the violations and the time frame for implementing them. Prior to submission of the voluntary compliance plan, the State agency and the subrecipient should agree to discuss the issues to be addressed in the plan and concur on the measures to be taken and the extent of technical assistance necessary.

This subpart must describe the State agency's role in securing voluntary compliance through discussions with subrecipients found to be in violation. It should state how the subrecipient will be given the opportunity to discuss the violations, the degree of formality of the discussions, and the State agency official who will participate in the discussions. In addition, the MOA must describe how the State will monitor compliance in the future to ensure that violations do not recur.

E-1. Development of the Voluntary Compliance Plan

This subpart must describe the necessary components of a subrecipient compliance plan. It should outline a proposed format for the plan and a time frame for its development and submission to the State agency for approval. The time frame must require subrecipients to submit compliance plans in an acceptable form for approval by the State agency no more than 90 days after the State agency issues the on-site compliance review notification of findings.

E-2. Notification to OCR

The Department expects each State agency to report the details of findings of noncompliance for each subrecipient that fails to take corrective action to remedy violations found during compliance reviews. State agencies must submit these reports of noncompliance and a description of the efforts made by the State agency to secure voluntary compliance directly to the appropriate regional office of the Office for Civil Rights. The MOA must provide for the State agency to submit these reports as soon as it determines that it cannot secure voluntary compliance from the subrecipient, but not later than 90 days after the State agency issues its on-site compliance review notification of findings if the subrecipient refuses to submit a compliance plan (See Part E-1, above). The MOA must provide for the State agency to notify OCR no later than 120 days after the State agency issues its on-site compliance review notification of findings if the subrecipient submits a plan that is inadequate but is working in good faith with the State agency to remedy the deficiencies in the plan.

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PART FIVE - REPORTING TO THE DEPARTMENT

The Guidelines require that each State agency recipient periodically report its activities and findings under its compliance program to the Office for Civil Rights. (See Section II(3)(4) of the Guidelines.)

The Department expects each State agency to submit a yearly civil rights compliance report each July, beginning July 1, 1980. As in the case of the MOA, the compliance reports must be submitted to the Bureau of Occupational and Adult Education. After reviewing and commenting on the reports, BOAE will submit them to the Office for Civil Rights.

This part of the MOA should describe the format of the reports the State agency will provide to the Department. Recommended content areas for these reports are provided below.

5-A. The Annual Civil Rights Compliance Report

The MOA must describe the main content areas that will be included in the report. The report must describe the State agency's compliance activities, the subrecipients that have been reviewed, the subrecipients that have been found to be in possible noncompliance, and the steps the State agency has taken to bring each subrecipient into compliance.

The annual report must contain the following sections:

(1) Compliance Organization and Staff. Report modifications to Part 2 of the MOA regarding staff authority, structure, and personnel.

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(2) State Policy Review. Report findings of the State policy review and a description of the action taken by the State agency to amend and correct any policies and procedures found to have a discriminatory effect in the four areas cited in Section II(A) of the Guidelines.

(3) Review of State-Operated Institutions and Programs. Report findings of the review of State-operated institutions and programs and a description of the action taken by the State agency to correct any problems identified.

(4) Subrecipients Receiving Agency Level Reviews. List each subrecipient receiving an agency level review. List any changes in the procedures, data sources, or analysis plan described in the MOA.

(5) Identification of Subrecipients for On-Site Reviews. List each subrecipient receiving an on-site review and include a summary of the findings. The findings should include a copy of each voluntary compliance plan entered into with a subrecipient.

(6) Technical Assistance Provided. List each subrecipient requesting technical assistance, with a summary of the technical assistance provided.

(7) Subrecipients Referred to OCR. List each subrecipient found to be in noncompliance and referred to OCR as a result of failing to take measures to achieve voluntary compliance.

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(8) __Monitoring Activities.__ Indicate what monitoring activities the State agency has performed during the year to ensure that corrective action has been taken by subrecipients found to be in noncompliance.

APPENDIX A

REGIONAL CIVIL RIGHTS OFFICES

REGION I — Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Office for Civil Rights, Region I
Department of Health, Education, and Welfare
140 Federal Street - 14th Floor
Boston, Massachusetts 02110
Telephone No. - 617-223-6397

REGION II - New Jersey, New York, Puerto Rico, Virgin Islands

Office for Civil Rights, Region II
Department of Health, Education, and Welfare
26 Federal Plaza - 33rd Floor
New York, New York 10007
Telephone No. - 212-264-4633

REGION III — Delaware, District of Columbia, Maryland, Virginia, Pennsylvania, West Virginia

Office for Civil Rights, Region III
Department of Health, Education, and Welfare
Gateway Building, 3535 Market Street
Post Office Box 13716
Philadelphia, Pennsylvania 19101
Telephone No. - 215-596-6787

REGION IV — Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee

Office for Civil Rights, Region IV
Department of Health, Education, and Welfare
101 Marietta Street - 27th Floor
Atlanta, Georgia 30323
Telephone No. - 404-221-5934

REGION V — Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin

Office for Civil Rights, Region V
Department of Health, Education, and Welfare
300 South Wacker Drive
Chicago, Illinois 60606
Telephone No. - 312-353-2520

REGION VI — Arkansas, Louisiana, New Mexico, Oklahoma, Texas

Office for Civil Rights, Region VI
Department of Health, Education, and Welfare
1200 Main Tower Building - Room 1930
Dallas, Texas 75202
Telephone No. - 214-767-3951

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REGION VII — Iowa, Kansas, Missouri, Nebraska

Office for Civil Rights, Region VII
Department of Health, Education, and Welfare
Twelve Grand Building
1150 Grand Avenue
Kansas City, Missouri 64106

Telephone No. - 816-374-2474

REGION VIII — Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming

Office for Civil Rights, Region VIII
Department of Health, Education, and Welfare
Federal Office Building
1961 Stout Street - Room 1185
Denver, Colorado 80294

Telephone No. - 303-837-5695

REGION IX — Arizona, California, Nevada, Hawaii, Guam, Trust Territory of Pacific Islands, American Samoa

Office for Civil Rights, Region IX
Department of Health, Education, and Welfare
1275 Market Street - 14th Floor
San Francisco, California 94103

Telephone No. - 415-556-8586

REGION X — Alaska, Idaho, Oregon, Washington

Office for Civil Rights, Region X
Department of Health, Education, and Welfare
1321 Second Avenue — MS/723
Seattle, Washington 98101

Telephone No. - 206-442-0473

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APPENDIX C

MULTIPURPOSE CHECKLIST FOR REVIEW OF STATE METHODS OF ADMINISTRATION FOR IMPLEMENTING THE VOCATIONAL EDUCATION CIVIL RIGHTS GUIDELINES

STATE

DATE SUBMITTED

DATE REVIEWED (BOAE)

DATE REVIEWED (OCR)

DATE APPROVED (OCR)

BOAE DSVPO REVIEWER

OCR REVIEWER

FOR FEDERAL USE ONLY
ANY OTHER USE PROHIBITED

CHECKLIST FOR REVIEWING VOC-ED METHODS OF ADMINISTRATION

SECTION NUMBER AND REQUIREMENT	QUANTIFYING CRITERIA	MOA PAGE	BOAE Substantial Approval Review			OCR Compliance Review			COMMENTS
			Provisions Included			Provisions Approvable			
			YES	NO	N/A	YES	NO	N/A	
1-A Development of MOA	Describes process by which MOA was developed	1							
1-B Approval of MOA	Describes process by which MOA reviewe and/or approved by State before submission to DHEW.								
2-A Organization of Compliance Activities	Describes how State agency will administer compliance program.								
2-B Personnel Assigned to Implement the Compliance Program	States name, position, office componen, address, phone number of person/persons assigned to carry out State agency's civil rights compliance program.								
3-A Conduct of State Policy Review	Describes the process State agency will follow in determining whether its policies and procedures are free from unjustified discriminatory effects.								
	Describes outline of State agency policies and procedures that will be reviewed for the following areas: (1) establishment of criteria or formulas for distribution of federal or State funds to vocational education programs in the State; (2) the establishment of requirements for admission to or administration of vocational education programs; (3) the approval of action by local entities; and (4) the conduct of their own program.								
	Identifies administrative office designated to review State agency policies and procedures.								

HECKLIST FOR REVIEWING VOC-ED METHODS OF ADMINISTRATION

			BOAE Substantial Approval Review			OCR Compliance Review			
			Provisions Included			Provisions Approvable			
SECTION NUMBER AND REQUIREMENT	QUANTIFYING CRITERIA	MOA PAGE	YES	NO	N/A	YES	NO	N/A	COMMENTS
3-B Scleduling the Policy Review	Assures that initial review of State policies and procedures will be completed by July 1, 1980 for submission in annual report.								
	Assures that subsequent reviews of policies will be conducted and results of reviews included in annual report whenever there have been significant changes in policies or procedures that could affect civil rights compliance.								
3-C Review of State-operated Institutions and Programs	Describes system and schedule by which State agency will determine whether State operated institutions and programs are complying with the Guidelines.								
4-A Ensuring Compliance by Subrecipients/Statement of Objectives	In sufficient detail, State Agency plans for meeting its civil rights obligations including:								
	Conducting agency level and and on-site reviews								
	Provision of technical Assistance								
	Procedures for voluntary corrective action								
	Periodic reports to the Office for Civil Rights concerning its compliance activities and findings								

INITIALS OF

CHECKLIST FOR REVIEWING VOC-ED METHODS OF ADMINISTRATION

			BOAE Substantial Approval Review			OCR Compliance Review			
			Provisions Included			Provisions Approvable			
SECTION NUMBER AND REQUIREMENT	QUANTIFYING CRITERIA	MOA PAGE	YES	NO	N/A	YES	NO	N/A	COMMENTS
4-B-1 Number of Reviews Per Year	Provides for agency level review of at least 20 percent of all subrecipients each year.								
4-B-2 Selection of Subrecipients for Review	Describes method for determining which subrecipients will be subject of agency level review in a given year.								
	Describes how subrecipients most likely to have compliance problems will be reached.								
4-B-3b Analysis of Information	Describes kinds of information that will be reviewed to determine whether or not the subrecipient is meeting its civil rights obligation.								
4-B-5 Timetable	Specifies when each phase of agency level review will take place.								
4-C-1 and 4-C-2 Number of Reviews Per Year/ Selection of Subrecipients for Review	Specifies that all subrecipients found to have possible compliance problems, as a result of conducting agency level reviews, will be scheduled for on-site reviews.								
	Specifies that at least 25 percent of those subrecipients reviewed at agency level will be subject to on-site reviews.								
	Specifies that if subrecipients selected for on-site reviews do not equal 25 percent of those selected for agency level reviews, the balance will be made up of randomly selected subrecipients from pool of those reviewed at the agency level in that year,								

CHECKLIST FOR REVIEWING VOC-ED METHODS OF ADMINISTRATION

			BOAE Substantial Approval Review			OCR Compliance Review			
			Provisions Included			Provisions Approvable			
SECTION NUMBER AND REQUIREMENT	QUANTIFYING CRITERIA	MOA PAGE	YES	NO	N/A	YES	NO	N/A	COMMENTS
4-C-3(a) and (b) Conducting On-Site Reviews	Describes lines of inquiry that will be pursued to determine whether problem identified during agency level review is or is not the result of unlawful discrimination.	16 17							
	Notes those areas in which problems can best determined on the basis of an on-site review.	[illegible]							
	States that all agency level findings will be verified during on-site review process.	11							
4-C-4 Notification of Subrecipients	Provides for notification to each subrecipient of State agency findings at conclusion of on-site review.	[illegible]							
	Provides that the notification must state that either: (1) no violations have been found (with a reminder of the subrecipient's continuing civil rights obligations and a statement to the effect that OCR may still wish to review the subrecipient) or (2) that violations have been found and the subrecipient will be given an opportunity to discuss the violations with the State agency and to submit a plan to remedy the violations voluntarily.	[illegible]							
	Provides that a copy of the notification will go to the appropriate regional OCR office.								
4-C-5 Timetable	Specifies when each phase of on-site review process will take place.	17							

CHECKLIST FOR REVIEWING VOC-ED METHODS OF ADMINISTRATION

SECTION NUMBER AND REQUIREMENT	QUANTIFYING CRITERIA	MOA PAGE	BOAE Substantial Approval Review Provisions Included			OCR Compliance Review Provisions Approvable			COMMENTS
			YES	NO	N/A	YES	NO	N/A	
4-D Use of Technical Assistance as a Means for Preventing Civil Rights Violations	Includes the following information:								
	The nature and frequency of notification to subrecipients of the availability of technical assistance;								
	The kinds of assistance that will be available (for example, advice on particular questions; overviews of subrecipients' total operations; dissemination of written materials; training sessions); and								
	The numbers of people who will be assigned to technical assistance activities; and whether this will be their sole responsibility or whether they will be involved in review activities as well.								
4-E Obtaining Voluntary Compliance	Describes State agency role in securing voluntary compliance.								
	Describes how State agency will monitor subrecipient compliance in future to ensure that violations do not recur.								
4-E-1 Development of the Voluntary Compliance Plan	Describes necessary components of subrecipient compliance plan.								
	Describes timeframe for subrecipients to submit compliance plans in acceptable form for approval by State agency which must be no more than 90 days after the State agency issues the on-site compliance notification of findings.								

CHECKLIST FOR REVIEWING VOC-ED METHODS OF ADMINISTRATION

			BOAE Substantial Approval Review			OCR Compliance Review			
SECTION NUMBER AND REQUIREMENT	QUANTIFYING CRITERIA	MOA PAGE	Provisions Included			Provisions Approvable			COMMENTS
			YES	NO	N/A	YES	NO	N/A	
4-E-2 Notification to OCR	Specifies that State agency will submit compliance reports to appropriate regional OCR office as soon as it determines that it cannot secure voluntary compliance from the subrecipient: 90 days after the State agency issues its on-site compliance review notification of findings if the subrecipient refuses to submit a compliance plan; and 120 days after the State agency issues its on-site compliance review notification of findings if the subrecipient submits a plan that is inadequate but is working in good gaith with the State agency to remedy the deficiencies in the plan.								
5-A The Annual Civil Rights Compliance Report	Describes the main content areas that will be contained in annual civil rights compliance report including: - Compliance organization and staff - State policy review - Review of State-Operated Institutions and Programs - Subrecipients reviewing agency level reviews - Identification of Subrecipients for On-Site Reviews - Technical Assistance provided - Subrecipients referred to OCR - Monitoring Activities								

APPENDIX D

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

February 22, 1984

Hon. Terrel H. Bell, Secretary
U.S. Department of Education
400 Maryland Avenue, S.W., Room 4181
Washington, D.C. 20202

Dear Secretary Bell:

On January 11, 1984 the undersigned wrote Assistant Secretary for Civil Rights Harry M. Singleton concerning California's total failure to carry out the Methods of Administration for identifying and remedying discrimination in vocational education programs in that state, which had been submitted to and approved by the Department in 1980. Mr. Singleton referred that letter to the OCR Regional Office in San Francisco for investigation.

We have now been informed that our complaint will be investigated only under Title VI of the 1964 Civil Rights Act, and not under Title IX of the Education Amendments of 1972 or Section 504 of the Rehabilitation Act of 1973. The reason for this is that the Title VI regulations explicitly require appropriate Methods of Administration to be submitted to the Department for approval and implementation while the Title IX and Section 504 regulations do not. The Department apparently adheres to the position that it lacks authority to enforce Title IX and Section 504 with respect to subrecipient practices of which the state is or should be aware, despite the fact that California included Title IX and Section 504 in its MOA in 1980 and the Department accepted it on that basis.

We disagree with OCR's interpretation of its authority and have communicated our position to Mr. Singleton today. However, we are writing directly to you about a different aspect of the problem. In November, 1982 Assistant Secretary Singleton submitted to you (through the regular Departmental clearance process) an NPRM making the necessary changes in the Title IX and Section 504 regulations to end this controversy. It has never been published. We urge you to resuscitate it and approve it as promptly as possible.

This is not a problem unique to your administration of the Department. In 1979 when the Vocational Education Guidelines were published, 44 Fed. Reg. 17162-75 (March 21, 1979), they included a footnote in which the Department [of HEW] announced that it would amend the Title IX and Section 504 regulations in the manner subsequently proposed by Mr. Singleton. For some reason, this was not accomplished prior to your tenure, and for whatever reason it has not been accomplished since that time. It should and must be dealt with now.

You have repeatedly emphasized your desire to see the states play a larger role in educational matters. The MOA process outlined in Section II of the Vocational Education Guidelines creates a mechanism by which the states may share -- but not supersede -- the Department's statutory responsibilities for compliance with federal civil rights requirements in education. The process can be effective, however, only if the federal government retains and carries out the authority to insure adequate standards of performance by state educational agencies under their MOAs. Thus, the Department's failure to amend the Title IX and Section 504 regulations as Mr. Singleton suggested in 1982 retards, rather than advances, any enlargement of the states' role. There is an inconsistency with the professed policy of your Department, which we urge you to correct as soon as possible by publishing the NPRM and adopting it in final form as rapidly as you can.

Copies of the relevant correspondence are enclosed for your convenience. We trust that your Executive Secretariat will bring these matters directly to your attention rather than referring this letter to OCR for the drafting of a response; Mr. Singleton made the right recommendation nearly a year and a half ago but apparently your personal intervention, Mr. Secretary, is required to move the Department in the right direction.

May we please hear from you on this subject at your early convenience.

Sincerely yours,

Phyllis McClure

Norman Chachkin

Phyllis McClure
NAACP Legal Defense and
Educational Fund, Inc.
806 15th Street, N.W.
Suite 940
Washington, D.C. 20005

Norman J. Chachkin
Deputy Director
Lawyers' Committee for Civil
Rights Under Law
1400 'Eye' Street, N.W., Suite 400
Washington, D.C. 20005

Donna Hitchens ryc

Donna Hitchens
Equal Rights Advocates, Inc.
1370 Mission Street
San Francisco, California ~~[illegible]~~ 94103

Ronald T. Vera ryc

Ronald T. Vera
Mexican American Legal
Defense and Educational
Fund
28 Geary Street
San Francisco, California 94108

Enclosures

cc: Robert L. Brown
Regional Director
Office for Civil Rights, Region IX
Hon. Harry M. Singleton

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

MAR 16 1984

Mr. Norman J. Chachkin
Deputy Director
Lawyer's Committee for
Civil Rights Under Law
1400 Eye Street, N.W., Suite 400
Washington, D.C. 20005

Dear Mr. Chachkin:

Thank you for your letter expressing concern about the Notice of Proposed Rulemaking (NPRM) amending the Title IX and Section 504 regulations to require States to submit Methods of Administration to the Department for approval and implementation. I am sending a similar response to the other signers of your letter.

The NPRM is currently in the Departmental clearance process and a preliminary regulatory impact analysis is being conducted pursuant to the President's Executive Order 12291, 46 Federal Register 13193 (February 19, 1981).

As you correctly noted, I am committed to the position that the States should play a larger role in educational matters and should share in the responsibility for ensuring compliance with all civil rights requirements in their educational programs.

Thank you for expressing your concerns on this subject.

Sincerely,

T. H. Bell

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

APPENDIX E

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

February 22, 1984

Honorable Harry M. Singleton
Assistant Secretary for Civil Rights
U.S. Department of Education
330 C Street, S. W.
Washington, D. C. 20202

Dear Mr. Singleton:

Thank you for your letters of February 3, 1984 to each of the undersigned, concerning our joint communication to you of January 11, 1984 about California's failure to carry out its obligations under the Methods of Administration submitted pursuant to the Vocational Education Guidelines, 44 Fed. Reg. 17164 (March 21, 1979). We had previously received correspondence from the regional office indicating that you had forwarded our letter to San Francisco and that it would be treated as a complaint.

We welcome your acknowledgement that there are "significant problems" with the MOA process in California. Although that is a drastic understatement of the state's outright failure to comply with Section II of the Guidelines (as we outlined in our earlier letter), we are hopeful that placing your imprimatur on the matter will enable the regional office to obtain the necessary results. Failing that, of course, we would expect the Department to initiate enforcement action.

We are disturbed, however, about your position on the Department's authority under Title IX and Section 504 with respect to the MOAs.

We know that you personally have recognized, since taking office, that the easiest way to clear up any ambiguity which now exists is to amend the regulations under those statutes. We are aware that in November, 1982, you sent forward an NPRM to this effect within the Department, and that it was never cleared for publication. We urge you to redouble your efforts within the agency to make this change; we are today writing to Secretary Bell ourselves about the matter (copy enclosed).

We cannot, however, accept OCR's narrow view of its own authority in the absence of such a formal regulatory change. The letter we received from Region IX (copy also enclosed) says:

> . . . OCR apparently lacks the regulatory authority to enforce Section II of the Guidelines as to Title IX and Section 504, since only the Title VI Regulation has a provision requiring that state agency recipients implement Methods of Administration approved by the Department. . . .
>
> Your complaint concerns refer to OCR's authority under Titles VI and IX, and Section 504. Since OCR presently does not have the authority to determine a state agency's compliance with its MOA and Section II of the Guidelines under Title IX and Section 504, your complaint will only be investigated under Title VI. */

We believe the Department's approach is fundamentally in error and constitutes an unnecessary self-imposed limitation upon its enforcement authority which retards the achievement of equal opportunity within vocational education.

1. Even if one assumes that amendments to the Title IX and Section 504 regulations would be necessary to support a fund termination proceeding which the Department were to commence against a state which refused to submit an MOA covering Title IX and Section 504, that is not the situation in California. Both the State Department of Education and the Chancellor's Office submitted MOAs applicable to all three civil rights statutes. Upon their acceptance by OCR, the respective state agencies and the Department entered into a contract. In case of a failure or refusal to implement the MOAs, the Department unquestionably has authority to take enforcement action because of the breach of contractual obligations. See Bell v. New Jersey, 76 L. Ed. 2d 312, 326 (1983) ("The State chose

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*/ You apparently endorse this interpretation. In a February 2, 1984 letter to Norman Chachkin about New Mexico, you say that "Regulatory amendments applying the Vocational Education Guidelines to Title IX and Section 504 have not yet been adopted." (We are sure that you meant to limit your comment to Section II of the Guidelines· even accepting the basic premise of OCR's position, the substantive portions of the Guidelines are effective with respect to Title IX and Section 504, as well as Title VI!)

to participate in the Title I Program and as a condition of receiving the grant freely gave its assurances that it would abide by the conditions of Title I"); United States v. Marion County School Dist., 625 F.2d 607, 613 (5th Cir. 1980) ("the remedies for school discrimination expressly authorized by Congress in the Civil Rights Act of 1964 were not intended to . . . restrict the United States' right to sue to enforce contractual assurances of compliance with Title VI"); Lemon v. Bossier Parish School Bd., 370 F.2d 847 (5th Cir. 1967).

Moreover, with respect to the Chancellor's Office, not only has the state agency violated its MOA contract, but in 1983 it defaulted on a negotiated settlement pursuant to a valid complaint filed with OCR. Failure to undertake the specific corrective action with respect to apprenticeship programs spelled out in the Letter of Findings of February 25, 1983 in Docket No. 09-81-2065 constitutes noncompliance which is clearly an appropriate basis for administrative enforcement proceedings, including deferral of funding.

2. Both the State Department of Education and the Chancellor's Office are recipients of federal funds, and they (presumably) have signed Assurances of Compliance with Title VI, Title IX and Section 504. The Title IX and Section 504 regulations each hold state agencies responsible for assuring nondiscrimination in the use of federal funds, not only directly but also with respect to subrecipients to which those state agencies pass on federal funds. See, e.g., 45 C.F.R. §§84.3(f), 84.4(b)(4), 86.2(h), 86.31(b)(7) (1983). Hence, the Title IX and Section 504 regulations already require that states utilize some appropriate mechanism for assuring nondiscrimination by their subrecipients -- even if they do not explicitly require that that mechanism be identical to the MOA process described in the Vocational Education Guidelines or the Memorandum of Procedures issued by the Department in 1979. This view is confirmed by the Preamble to the Guidelines, which declares that they "merely restate what has become axiomatic -- a recipient cannot engage or participate in unlawful discrimination." 44 Fed. Reg. 17163 (March 21, 1979). See also Idaho Migrant Council v. Board of Education, 647 F.2d 69 (9th Cir. 1981) (state board of education responsible under Title VI, and its own assurance of compliance for Title VI compliance of local districts).

Our January 11, 1984 letter asserts that neither the State Department nor the Chancellor's Office has carried out the MOAs which they submitted, and that neither is meeting its obligation to assure that subrecipients of federal funds do not discriminate. The Department has ample authority -- and, indeed, a constitutional and statutory obligation -- to investigate the second part of our allegation, without regard to any MOA questions.

3. Region IX proposes to limit its investigation to Title VI only. This could produce the absurd result of a negotiated agreement applying only to Title VI which, by implication, would be read as authorizing the State Department of Education and the Chancellor's Office to ignore Title IX and Section 504 violations. But even a state whose MOA were limited to Title VI is not free to ignore Title IX or Section 504 problems which come to its notice during agency-level or on-site reviews of subrecipients under Title VI. A state which did so would violate existing Title IX and Section 504 regulations, as well as the underlying statutes themselves. OCR should not foster such an approach by limiting its investigation, negotiation and enforcement only to Title VI.

For these reasons, we do not accept your limited view of OCR's authority and we urge that you reverse the regional office immediately and instruct the region to investigate and resolve our January 11, 1984 complaint under Title IX and Section 504 as well as Title VI.

Our second major problem with your response is that it does not address the suggestion we made, of funding deferral. As we outlined in our January 11 letter to you, California's default has been massive and flagrant. The regional office conducted a review in 1983 which apprently reached this conclusion as to the State Department of Education but has thus far been unable to reach agreement on a plan of corrective action. Under the circumstances, we reiterate our view that immediate deferral of applications for future VEA funding is needed and appropriate to secure an adequate remedy from state authorities. It would also be a welcome signal to MOA staff in other jurisdictions that OCR is serious about MOA enforcement.

We look forward to hearing from you further about these matters.

Sincerely yours,

Phyllis McClure
Phyllis McClure
NAACP Legal Defense and
Educational Fund, Inc.
806 15th Street, N. W.
Suite 940
Washington, D. C. 20006

Norman Chachkin
Norman J. Chachkin
Deputy Director
Lawyers' Committee for Civil
Rights Under Law
1400 Eye Street, N. W.
Suite 400
Washington, D. C. 20005

Donna Hitchens vjc
Donna Hitchens
Equal Rights Advocates, Inc.
1370 Mission Street
San Francisco, California 94103

Ronald T. Vera vjc
Ronald T. Vera
Mexican American Legal Defense
and Educational Fund
28 Geary Street
San Francisco, California 94108

cc: Robert L. Brown, Regional Director
Honorable Terrel H. Bell

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

MAR 23 1984

Mr. Norman J. Chachkin
Deputy Director
Lawyers' Committee for
Civil Rights Under Law
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005

Dear Mr. Chachkin:

Thank you for your letter of February 22, 1984, in which you expressed your opinions concerning the authority of the Office for Civil Rights (OCR) to enforce the obligations of California's State agencies under their vocational education Methods of Administration (MOAs) as to Title IX and Section 504 absent regulatory provisions requiring that State agency recipients implement MOAs as to Title IX and Section 504. I appreciate your comments and recognize that they were made in the spirit of ensuring enforcement of civil rights in all programs receiving Federal financial assistance. Nevertheless, I cannot agree:

1) that OCR should attempt to enforce a contractual obligation that was premised on the express statement of the Federal Government that regulatory revisions requiring MOAs as to Title IX and Section 504 would be forthcoming or "the Guidelines must be revised." (emphasis added) (Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap, Supplementary Information, footnote 1; 44 Fed. Reg. 17163 (March 21, 1979));

2) that OCR necessarily should equate State agency failure to carry out responsibilities under an MOA with engaging or participating in unlawful discrimination; or

3) that OCR ever has suggested that States should "ignore" violations of Title IX or Section 504 that come to light during desk audits or on-site reviews of subrecipients undertaken under Title VI.

You also suggest that funding deferral in these cases is, in your view, "needed and appropriate to secure an adequate remedy from state authorities." As you know, the head of OCR is vested with the discretion to select among available sanctions to arrive at the best method to secure compliance. Funding deferral is one of those options, but it is not appropriate in all cases.

Funding deferral is a temporary device used to maintain the status quo pending completion of the procedures required before ultimate sanctions can be imposed. (See, Guidelines for the enforcement of Title VI, Civil Rights Act of 1964, 28 C.F.R. § 50.3). In light of this relationship, it has never been OCR's policy to begin funding deferral before a Notice of Opportunity for Hearing has been issued in a case. I do not intend to change that policy now. Furthermore, deferral "is appropriate only with respect to applications for noncontinuing assistance or initial applications for programs of continuing assistance." (28 C.F.R. § 50.3 I. A.). Federal funding for vocational education programs is often continuing assistance and so funding deferral is rarely appropriate, even as a temporary measure, as to those monies.

Sincerely,

Harry M. Singleton
Assistant Secretary
for Civil Rights

APPENDIX F

The FEDERAL EDUCATION PROJECT

Linda Brown
Director

Norman Chachkin
Counsel

Janet Wells
Associate Director

Ruth Gordon
Debra Miller
Staff Attorneys

Carolyn Douglas
Program Associate

Frances Courtney
Betty Green
Project Secretaries

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 520 • 733 FIFTEENTH STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 628-6700

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

July 5, 1983

The Honorable Harry M. Singleton
Assistant Secretary for Civil Rights
U.S. Department of Education
Office for Civil Rights
330 C Street, S.W.
Washington, D.C. 20202

Dear Mr. Singleton:

In the course of my research on states' implementation of their Methods of Administration (MOA) pursuant to the Vocational Education Programs Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap (the Guidelines), I have learned that the state of New Mexico has consistently maintained that it has no responsibility under the Guidelines for monitoring the civil rights compliance of public secondary schools. The state's basis for this position is that the New Mexico public secondary schools are not receiving federal vocational education funds, and, therefore, are not subrecipients subject to monitoring by the state.

Based on information elicited from the state by OCR Region VI office, however, all 89 of the New Mexico public elementary/secondary school districts receive federal financial assistance under Title IV-B and 86 of those school districts receive federal aid under Title I. The OCR regional office also found that the State Department of Education is involved in distributing these federal funds to local schools. In addition, the OCR regional office found at least one secondary school that receives federal vocational education funds.

The OCR Region VI office, following its Fall 1982 review of New Mexico's 1981 and 1982 Annual Civil Rights Compliance Reports, referred the matter of the state's refusal to monitor public secondary schools to OCR Headquarters office for resolution.

I am writing to inquire about the status of OCR Headquarters' response on this issue. Specifically, I am interested to know whether OCR has made a decision about whether public secondary schools that receive federal education grants other than through the Vocational Education Act must be considered subrecipients under the Guidelines. I would appreciate your providing me with any OCR Headquarters documents that contain the office's decision on this question, or if no official response/decision has been made, an explanation of the steps taken by OCR Headquarters so far to address the issue.

Thank you for your prompt consideration of this matter. I look forward to hearing from you soon.

Sincerely,

Debra A. Miller

Debra A. Miller

DAM:flc

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

AUG 3 1 1983

Ms. Debra A. Miller
The Federal Education Project
Lawyers' Committee for
  Civil Rights Under Law
733 15th Street, N.W., Suite 520
Washington, D.C. 20005

Dear Ms. Miller:

This is in response to your recent letter about the New Mexico Department of Education's implementation of Methods of Administration pursuant to the Vocational Education Program Guidelines. You asked specifically about the recipient's status of secondary schools in New Mexico that receive Federal financial assistance other than through the Vocational Education Act.

As you know, the Region VI Office for Civil Rights has raised questions about the compliance status of the New Mexico Department of Education. Headquarters staff has determined that New Mexico differs substantially from other states in the operation of vocational education programs. While other states in many instances provide a complete vocational education program at the high school level, New Mexico appears to offer only individual courses at the secondary level. In addition, data received by the Region VI office from the New Mexico Department of Education show that the State pays the tuition at some local school districts for individual vocational education students to attend an area vocational-technical school. These schools are classified by New Mexico as postsecondary institutions.

Headquarters policy staff is currently examining compliance data submitted by area vocational-technical schools. It has been determined that these schools receive Federal vocational education grant funds and are included in the annual civil rights compliance report concerning postsecondary schools. However, the regional office question addresses whether New Mexico is obligated, under the Vocational Education Methods of Administration to monitor civil rights compliance relative to its subrecipients at the secondary level.

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

The headquarters policy staff is considering this matter. As soon as a determination has been made as to how this office will proceed, you will be so informed.

Sincerely,

Harry M. Singleton
Assistant Secretary
for Civil Rights

cc: Taylor D. August, Regional Civil Rights Director, Region VI

Linda Brown
Director

Norman Chachkin
'*Counsel*

Janet Wells
Associate Director

Ruth Gordon
Debra Miller
Staff Attorneys

Carolyn Douglas
Program Associate

Frances Courtney
Betty Green
Project Secretaries

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 520 • 733 FIFTEENTH STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 628-6700

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

December 2, 1983

The Honorable Harry M. Singleton
Assistant Secretary for Civil Rights
U.S. Department of Education
Office for Civil Rights
330 C Street, S.W.
Washington, D.C. 20202

Dear Mr. ~~Singleton~~: Harry:

On July 5, 1983 Debra Miller of the Federal Education Project wrote to you requesting information about the status of OCR Headquarters action on a policy referral from Region VI concerning the responsibilities of the New Mexico State Department of Education to monitor the status of civil rights compliance in vocational programs offered in New Mexico's public secondary schools. You responded on August 31, indicating that the policy staff in Washington was studying the matter and that "[a]s soon as a determination has been made as to how this office will proceed, you will be so informed."

Since then, we have heard nothing from you or anyone else in OCR on this subject. We cannot understand why it is taking the Office for Civil Rights so long to reach a decision on the rather straightforward and, in our view, simple, issue involved in this controversy. Whatever the cause, the fact is that since 1979, when the Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap in vocational education programs were promulgated, there has been no enforcement activity relating to secondary vocational programs in New Mexico and this situation will continue until the policy question referred from Region VI is resolved.

The issue concerns the State Department of Education's responsibilities under the Guidelines. New Mexico asserts that it need monitor the civil rights compliance only of "subrecipients" which receive funds under the Vocational Education Act of 1963, as amended. We believe this is a misinterpretation of the Guidelines which stems from a fundamental misunderstanding about their basis. The Guidelines do not grow out of any provision of the federal substantive authorizing statute, the Vocational Education Act. They provide further elaboration of the responsibilities of recipients of federal financial assistance under Title VI, Title IX and Section 504.

Section I.A. of the Guidelines, 44 Fed. Reg. 17164 (March 21, 1979) states that they "apply to recipients of any Federal financial assistance from the Department [of Education] that offer or administer programs of vocational education or training" (emphasis added). The fact that New Mexico may choose to distribute its VEA funds only to post-secondary institutions is therefore irrelevant to the issue, since there is no question at all about the fact that all of New Mexico's public school systems receive "Federal financial assistance" from the Department of Education. (Most receive Chapter 1 funds and all receive Chapter 2 funds.) Moreover, the investigation conducted by Region VI — according to materials we have reviewed pursuant to a request under the Freedom of Information Act — indicates that (a) at least one secondary school system received VEA funds through the State Department of Education, and (b) the State Department of Education plays an integral role in all funding requests seeking state or federal funds for vocational programs. Thus, we do not believe there is any serious basis for concluding that New Mexico's 89 public school districts are not "subrecipients" within the meaning of Section III.B. of the Guidelines, 44 Fed. Reg. 17165, since they "receiv[e] financial assistance through [the] State agency."

Whether New Mexico secondary schools provide vocational "programs" or only "courses" is not relevant to the issue. Title VI, Title IX and Section 504 require that all students have an equal opportunity to participate in and benefit from whatever vocational offerings are made available by a recipient of federal financial assistance.

As of September 1, 1982, OCR Region VI had not reviewed vocational programs in New Mexico at the secondary level in any school system. As of the present, the New Mexico State Department of Education has never reviewed the conduct of vocational programs in New Mexico at the secondary level. For all that any governmental official knows, then, there may well be outstanding violations of the relevant statutes or of the Vocational Education Guidelines that are going undiscovered or unremedied. I hope that you will not permit this situation to continue. OCR should insist that the New

Mexico Department of Education begin immediately to include review of secondary vocational programs in its MOA activities.

Please let us hear from you as promptly as possible about this matter.

Very truly yours,

Norman

Norman J. Chachkin
Acting Director
Federal Education Project

NJC:flc

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

FEB 2 1984

Mr. Norman Chachkin
The Federal Education Project
Lawyers' Committee for
Civil Rights Under Law
733 15th Street, N.W., Suite 520
Washington, D.C. 20005

Dear Mr. Chachkin:

This is in response to your request for clarification about OCR's position concerning the responsibilities of the New Mexico Department of Education to monitor the status of civil rights compliance in vocational education programs offered in New Mexico's public schools. I apologize for the delay in responding to the original letter from Ms. Miller.

I agree that Section I.A of the Vocational Education Guidelines, 44 FED. REG. 17164 (March 21, 1979) establishes that the Vocational Education Guidelines "apply to recipients of any Federal financial assistance from the Department [of Education] that offer or administer programs of vocational education or training" with respect to Title VI. (Regulatory amendments applying the Vocational Education Guidelines to Title IX and Section 504 have not yet been adopted.) There is no doubt that public secondary schools offering vocational education programs in New Mexico are "recipients" of "Federal financial assistance from the Department." They also are "subrecipients" within the meaning of Section II.B of the Guidelines, 44 FED. REG. 17165, because they receive "financial assistance through a State agency." The State, therefore, is responsible for monitoring the civil rights compliance of those subrecipients. This is our position in New Mexico and in all states.

I am now working with Region VI staff and New Mexico to resolve this problem.

Sincerely,

Harry M. Singleton
Assistant Secretary
for Civil Rights

cc: Mr. Taylor D. August, Regional Civil Rights Director, Region VI

APPENDIX G

Linda Brown
Director

Norman Chachkin
Counsel

Janet Wells
Associate Director

Ruth Gordon
Debra Miller
Staff Attorneys

Carolyn Douglas
Program Associate

Frances Courtney
Betty Green
Project Secretaries

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 520 • 733 FIFTEENTH STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 628-6700

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

January 11, 1984

The Honorable Harry M. Singleton
Assistant Secretary for Civil Rights
U.S. Department of Education
Office for Civil Rights
330 C Street, S.W.
Washington, D.C. 20202

Dear Mr. Singleton:

We are writing this letter to request that you take decisive action on behalf of the Department of Education to bring about meaningful compliance by the State of California with the requirements of the Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap in Vocational Education Programs, 34 C.F.R. Part 100, Appendix B; 44 Fed. Reg. 17162-75 (March 21, 1979).

Based upon information already in the possession of the Office for Civil Rights, much of which has been furnished to the Federal Education Project pursuant to requests under the Freedom of Information Act, we believe that you are aware of the fact that California has made no serious attempt to comply with Section II of the Guidelines by implementing the Methods of Administration which the state submitted to the Department of HEW in 1980. Annual reports in your possession demonstrate that the California State Department of Education, which administers the state's MOA at the secondary level, has never conducted a single on-site review of a subrecipient. Last year, the Office of the Chancellor of California Community Colleges, which is responsible for administering the California MOA at the post-secondary level, agreed to a settlement resolving a comprehensive complaint filed by the NAACP Legal Defense and Educational Fund, Inc., Equal Rights Advocates, Inc., and the Mexican American Legal Defense and Educational Fund, Inc. concerning the Chancellor's failure to implement the MOA or to act to prevent or eliminate discrimination in apprenticeship programs at the post-secondary level. Your investigative report sustained the allegations of the complaint and in the settlement agreement negotiated by OCR, the Chancellor's Office agreed to carry out an effective enforcement program beginning with the 1982-83 year. A report summarizing MOA activities during that time period was due to be filed in July, 1983, but it has never been submitted. The Chancellor's Office has not lived up to its obligations under either the settlement, the MOA which it submitted, or the Guidelines.

Since OCR has previously investigated a complaint concerning the responsibilities of the Chancellor's Office to carry out the state's MOA at the post-secondary level and negotiated a corrective action plan which the Chancellor's Office has failed to carry out, we believe that there are ample grounds for immediate enforcement action. As to the responsibilities of the California State Department of Education, if you conclude that the information which you already have is not an adequate basis for commencing enforcement, then we are requesting that you treat this letter as a complaint under Title VI, Title IX and Section 504 and that you promptly investigate the complaint and take appropriate action. In any event, we are specifically requesting that you immediately defer approval of further funding to the State of California under the Vocational Education Act so that maximum pressure can be brought to bear to encourage the correction of the State's flagrant violation of the Vocational Education Guidelines.

You are familiar with the major provisions of the Guidelines, including Section II, and with the Methods of Administration which they require from each state. California's Methods of Administration, committing the State Department of Education and the Chancellor's Office to carry out an enforcement program in vocational education, were approved by the Department of Education in 1980. The initial report on implementation of the MOA, dated "December, 1980," was submitted jointly by the State Department of Education and the Chancellor's Office in early January, 1981. That report, under the heading "List of Subrecipients Receiving Agency Level Review," identifies 75 secondary districts and 14 community colleges by name but provides no further information, nor any evidence that agency-level reviews were conducted. Under the heading "List of Subrecipients Receiving On-Site Review," this report states, "There are no subrecipients identified for an on-site review as of this date.."

The next report was dated "July, 1981" and submitted jointly by the State Department of Education and the Chancellor's Office. Under the heading "List of Subrecipients Receiving Agency-Level Review," this report states:

> The secondary school districts are divided into four cohorts for review, audit, and follow-up purposes. It was determined to select those districts for the agency-level review that are scheduled for desk review and audit. This

> group happened to be Cohort #1. Using this schedule, 25 percent of the districts will be reviewed annually rather than the required 20 percent. This effort will integrate the agency-level review with an existing ongoing process. Note that this list is new and different from the one in the December 1980 Report.

(The report then identifies 87 secondary districts and 14 community college districts without giving any indication that agency-level reviews were conducted.) This language reinforces the conclusion of the December, 1980 report that no agency-level reviews had yet been made. Under the heading "List of Subrecipients Receiving On-Site Review," this report states, "There are no subrecipients identified for an on-site review as of this date."

In July, 1982 another report was submitted to the Department by Patricia B. Langlin, Director, Office of Vocational Education, California State Department of Education. This report made explicit what had been implied by earlier submissions: that virtually no MCA activity in California had taken place. Under the heading "Subrecipient Review, the 1982 report states:

> Because of difficulties with application of resources expressed [sic] by the California State Department of Education, the two agencies are at different levels of responsiveness to the MOA and, consequently, their activities are described separately in this report.
>
> California State Department of Education
>
> As previously described the secondary and unified school districts and regional occupation program/centers are divided into four groups for evaluation, audit, management review and follow-up. Each group is a representative sample of the state as a whole. It was decided to select those districts for agency level review that are scheduled to be audited. . . . The listing of these schools is contained in Appendix A.
>
> Because of difficulties in obtaining resources to be applied to the review, this process has been delayed one year. The California State Department of Education developed an RFP which

> was mailed to interested parties June 23, 1982. This RFP will enable the California State Department of Education to comply with the MOA beginning with the Fall of 1982. The RFP is attached as Appendix B.
>
> Chancellor's Office, California Community Colleges
>
> The Chancellor's Office developed an RFP for a project to provide inservice education for state staff and Vocational Education staff in the community colleges for compliance with the Office for Civil Rights requirements in vocational education. . . .
>
> . . .
>
> 3. The project staff met at the Chancellor's Office to conduct a state level Desk Review of 21 community colleges which were randomly selected from the 106 community colleges through use of the random sampling numbers workbook. The listing of these colleges is contained in Appendix A.
>
> . . .

Under the heading "List of Subrecipients Receiving On-Site Review," the 1982 report states:

> California State Department of Education
>
> There are no subrecipients identified for an on-site review as of this date.
>
> Chancellor's Office, California Community College
>
> Five of the 21 community colleges which had not been visited by the U.S. Office for Civil Rights staff in 1981-82 were chosen for On-Site Reviews for possible noncompliance factors identified through the data reviewed. . . .
>
> The five colleges chosen from the Desk Audits were:
>
> Los Medanos College
> Evergreen College
> Cerritos College
> Saddleback College
> Palomar College

On October 17, 1983, Xavier Del Buono, Associate Superintendent, Vocational and Continuing Education, California State Department of Education, submitted a 1982-83 report (dated September, 1983) to the U.S. Department of Education. This report covers only the State Department of Education, and Mr. Del Buono's transmittal letter indicates that the Chancellor's Office would submit a separate report.

Under the heading "Subrecipient Review," the report of the California State Department of Education says:

> The California State Department of Education, experiencing difficulty applying personnel resources toward the implementation of the Methods of Administration, developed a RFP which was mailed to interested parties on June 23, 1982. July 30, 1982 was established as final date for submission of responses.
>
> Nine proposals were received, reviewed, and ranked with notification letters ready to mail on August 26, 1982. Because of internal difficulties, permission was not obtained to mail these letters until March 8, 1983.
>
> On that date, the contract was awarded to the Foothill De-Anza Community College District, but because of a governmental freeze on all contracts, this contract has not been finalized as of June 30, 1983.
>
> The contract contains procedures for selection of subrecipients for desk audit; procedures to be applied and documents to be reviewed during the desk review; criteria to be applied for the selection of subrecipients to receive an on-site review, procedures to be followed while on-site; and an outline of the content of letters of findings.
>
> Once the final letter of findings is issued, the State Department of Education will apply resources to obtain a plan of voluntary compliance from the subrecipient; will arrange for technical assistance as needed and will follow-up with the subrecipient to assure adherence to the plan of compliance.

> The contract makes provisions to review all vocational programs grades seven through twelve offered by the subrecipient or coterminous elementary districts in the case of a union high school district.

Under the heading "List of Subrecipients Receiving an On-Site Review," the report states, "There were no subrecipients identified for an on-site review during the 1982-83 program year."

As to the California State Department of Education, therefore, it is absolutely clear that there has been no MOA activity whatsoever during the initial three years of the program. Indeed, California attached to its 1982-83 report, as an exhibit, its "Response" to the Investigative Report in an OCR Compliance Review of its MOA process, which is identified with docket number 09-83-0404. The Response is dated September, 1983, and on pages 3 and 5 thereof, after quoting investigative findings made by the Office for Civil Rights, California states:

> Since there were no state reviews of institutions and practices in the years 1980-81, 1981-82, and 1982-83. . . .

With respect to the Chancellor's Office, on February 25, 1983 the Office for Civil Rights issued a letter to the complainants summarizing the results of its investigation of whether the Chancellor's Office had fulfilled its obligations under civil rights statutes and the MOA with regard to apprenticeship programs. The findings of this investigation, under docket number 09-81-2065, confirm that the Chancellor's Office conducted no MOA activity prior to 1982, that its MOA performance (through a contractor) during the 1981-82 year was inadequate, and that specific improvements were necessary. The letter also summarizes a detailed Corrective Action Plan to which the Chancellor's Office had agreed, to become effective commencing with the 1982-83 school year, and describing in detail how the Chancellor would carry out the MOA. Although that agreement states:

> The Chancellor's Office will submit to OCR in its 1983 MOA Annual Report documentation verifying that it has taken the action required to be completed during the 1982-83 academic year as set forth in this agreement

the Chancellor's Office has never filed a 1983 report and has not fulfilled its obligations under either the settlement agreement, Corrective Action Plan, or the Guidelines.

Despite this complete default by the State of California, the Office for Civil Rights has undertaken no meaningful enforcement activity. In response to a Freedom of Information Act request, we have learned from Region IX, OCR that the compliance review of the State Department of Education's MOA program is still open and that for this reason, materials related to the investigation cannot be released; thus, it is apparent that the Office for Civil Rights has not yet secured any remedy as to the secondary MOA program. At the postsecondary level, although the Chancellor's Office agreed to a Corrective Action Plan last year, it was to report on its 1982-83 activities under that plan by July 1, 1983. It has never submitted a report but OCR has taken no enforcement action.

Budgetary problems are not unique to California, but no other state has been as recalcitrant as California in its approach to its MOA obligations. Indeed, many states have made a good faith effort to implement the MOAs which they submitted in spite of personnel and financial problems. The positive attitude toward MOA compliance which may now exist in many states will not survive if the Office for Civil Rights fails to take forceful action against California. State authorities have repeatedly promised that they would meet their obligations under the Vocational Education Guidelines "next year" for several years. The time for dalliance is long past. We respectfully suggest that only deferral of future funding under the Vocational Education Act and prompt enforcement action by the Department of Education has any hope of producing meaningful results.

Please inform us promptly what action the Department will take in this matter.

Sincerely yours,

Phyllis McClure njc

Phyllis McClure
NAACP Legal Defense and
Educational Fund, Inc.
806 15th Street, N.W.
Suite 940
Washington, D.C. 20005

Norman J. Chachkin

Norman J. Chachkin
Deputy Director
Lawyers' Committee for Civil
Rights Under Law
733 15th Street, N.W., Suite 520
Washington, D.C. 20005

Donna Hitchens vjc

Donna Hitchens
Equal Rights Advocates, Inc.
1370 Mission Street
San Francisco, California 94193

Ronald T. Vera vjc

Ronald T. Vera
Mexican American Legal Defense
and Educational Fund
28 Geary Street
San Francisco, California 94108

cc: Robert L. Brown
Regional Director
Office for Civil Rights, Region IX

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGIONAL OFFICE
1275 Market St. 14th floor
San Francisco, CA 94103

27 JAN 1984

Norman J. Chachkin, Deputy Director
Lawyers' Committee for Civil
Rights Under Law
733 15th Street, N.W., Suite 520
Washington, D.C. 20005

Phyllis McClure
NAACP Legal Defense and
Educational Fund, inc.
806 15th Street, N.W., Suite 940
Washington, D.C. 20005

Donna Hitchens
Equal Rights Advocates, Inc.
1370 Mission Street
San Francisco, California 94193

Ronald T. Vera
Mexican American Legal Defense
and Educational Fund
28 Geary Street
San Francisco, California 94108

(In reply, please refer to Docket Nos. 09-84-1047, 09-84-2030, 09-83-0404, and 09-83-0405)

Dear Mr. Chachkin, Ms. McClure, Ms. Hitchens, and Mr. Vera:

On January 11, 1984, your organizations wrote to the Assistant Secretary for Civil Rights, Mr. Harry M. Singleton, at our Headquarters Office regarding your concerns with the State of California's compliance with the *Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap in Vocational Education Programs* (hereafter Vocational Education Guidelines). The Assistant Secretary has asked our Office to respond to your correspondence, since the San Francisco Regional Office for Civil Rights is the OCR Office responsible for investigations of complaints and determinations of compliance with the laws enforced by OCR by recipients of Education funds in the State of California.

You have specifically charged that the California State Department of Education (CSDE) and the Chancellor's Office of the California Community

Colleges (CCC), as the State governmental agencies responsible for implementing the provisions of the Vocational Education Guidelines, have failed to comply with Section II of those Guidelines, and have failed to implement the Methods of Administration (MOA) previously submitted to and approved by the Federal Department of Education. In addition, you have alleged that the Chancellor's Office of the CCC has failed to enforce the Corrective Action Plan (CAP) negotiated with OCR as a result of a complaint filed with this Office in 1981.

You further allege that the Chancellor's Office has failed to act to prevent or eliminate discrimination in the apprenticeship programs at the post-secondary level in the State. As a part of the CAP negotiated with OCR, the Chancellor's Office agreed to certain timeframes with respect to the submission of reports to OCR of its progress in enforcing the Guidelines and the MOA. You allege that the report due to OCR by July 1983 was never submitted. You have offered this information to support your allegation that the failure of the Chancellor's Office to act in this instance is discriminatory and in violation of the Vocational Education Guidelines.

You have requested that, if the information OCR has collected to date is insufficient to proceed to enforcement against these agencies, this Office initiate a prompt investigation of these allegations and take appropriate action. You have also requested that OCR defer approval of further funding to these agencies under the Vocational Education Act.

The Office for Civil Rights (OCR) has the responsibility under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973, to ensure that recipients of Federal financial assistance through the Department of Education do not discriminate against program beneficiaries on the basis of race, color, national origin, sex, and handicap. The California State Department of Education and the Chancellor's Office of the California Community Colleges receive funds from the Department; our Office, therefore, has jurisdiction to investigate allegations which, if true, would violate one or more of those laws or their implementing Regulations.

The Vocational Education Guidelines were issued pursuant to Titles VI and IX, and Section 504 and their implementing Regulations to provide additional guidance to recipients to ensure nondiscrimination in vocational education programs. Section II of the Guidelines, the section which you allege has been violated, is the section requiring each state to develop and implement an MOA and to conduct certain oversight activities. However, OCR apparently lacks the regulatory authority to enforce Section II as to Title IX and Section 504, since only the Title VI Regulation has a provision requiring that state agency recipients implement Methods of Administration approved by the Department. As you may remember, in March 1980, state agencies were asked to submit MOA's that included Title IX and Section 504 provisions based on the Federal Government's assurance that the promulgation of such amendments to the Title IX and Section 504 Regulations was imminent. To date, the MOA-related amendments to these Regulations have not been promulgated.

Your complaint concerns refer to OCR's authority under Titles VI and IX, and Section 504. Since OCR presently does not have the authority to determine a state agency's compliance with its MOA and Section II of the Guidelines under Title IX and Section 504, your complaint will only be investigated under Title VI.

As you know, these agencies have been subject to previous complaint investigations and compliance reviews by this Office. Your complaints have been assigned docket numbers denoting new complaints filed with this Office during the current fiscal year. However, we will be incorporating these complaints into our analysis of data gathered in support of compliance reviews already in progress. The docket numbers for each of the complaints and reviews are as follows:

Chancellor's Office of the California Community Colleges	- Complaint No. 09-84-2030
	- Review No. 09-83-0404
California State Department of Education	- Complaint No. 09-84-1047
	- Review No. 09-83-0405

We are required under the terms of Adams v. Bell, C.A. No. 3095-70 (D.D.C. March 11, 1983), to provide you with the following information.

We consider your complaint complete for the purpose of initiating an investigation which will begin in the near future. Within 90 days of initiating our investigation we will attempt to determine whether or not the recipients have violated Title VI. We will notify you and the recipients of the results of the investigation in a letter of findings. If there has been a violation, we will seek corrective action through negotiations with the recipients for a period not exceeding 90 days. If we are unable to secure an appropriate remedy within that time, we will initiate enforcement measures within the following 30 days by starting administrative hearing procedures or by other means authorized by law.

During the investigation, if we anticipate making a partial or total finding which does not support your allegations, we will advise you of the evidence and provide you with an opportunity to respond to such evidence.

After we issue the letter of findings you may request a copy of all our correspondence with the recipients pertaining to our determination regarding the merit of your complaints. If we find that a violation exists, we will keep you advised of the status of our negotiations. We will also consult with and obtain from you any additional information which may be needed to fashion an appropriate remedy.

The Regulations which implement the laws enforced by this Office prohibit the recipients from intimidating or harassing you or anyone else because you filed a complaint with our Office or are taking part in a resulting investigation. If you feel that such actions occur, you may file a separate complaint with this Office.

We must also inform you that under the Freedom of Information Act, it may be necessary to release this document and related correspondence in response to inquiry. Please note that our statement of the issue(s) in this letter represents only a preliminary analysis of your allegations. Your complaints will be assigned to our Postsecondary Education Division. An investigator will be in further contact with you. If you have any questions, please contact our Office by mail, or you may call C. Mack Hall, Director, Postsecondary Education Division, at (415) 556-8780.

Sincerely,

J Kresy-Poree

J. Kresy-Poree, Director
Program Review and Complaint Analysis

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

FEB 3 1984

Mr. Norman J. Chachkin
Deputy Director
Lawyers' Committee for
Civil Rights Under Law
733 15th Street, N.W. Suite 520
Washington, D.C. 20005

Dear Mr. Chachkin:

Thank you very much for your letter expressing concern about the status of MOA compliance activities by the Chancellor's Office, California Community Colleges and the California State Department of Education.

I, too, am concerned about vocational education MOA compliance in California. Compliance reviews of both state agencies have revealed significant problems with these agencies' MOA compliance activities. The regional office is now in the process of negotiating with the state agencies. I hope for a successful resolution of these negotiations.

The region has been instructed to treat your letter as complaints against both state agencies. They will be responding to you under separate cover.

Sincerely,

Harry M. Singleton
Assistant Secretary
for Civil Rights

cc: Mr. Robert L. Brown, Regional Civil Rights Director, Region IX

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202